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No. ______

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

DONNA M. MURILLO, ET ALS,

Petitioners,

vs.

W. LEWIS BAMBRICK, CLERK OF
THE SUPERIOR COURT OF NEW JERSEY,

Respondent,

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the right to divorce a fundamental right under the United States Constitution as is the right to marriage?

2. If the right to divorce is a fundamental right, did the Court of Appeals err in not applying the strict scrutiny analysis of the Equal Protection Clause to a State statute which denied divorce litigants a divorce unless they paid a substantial trial fee required of no other litigant in the same Court system?

3. In a unified state civil court system using the same judges, rules, courtrooms, facilities, personnel and sources of operating funds, may a state constitutionally deny a trial to that group of litigants whose trials actually cost the state the least, unless those litigants pay a substantial fee for their trials, while giving every other group of litigants using the same court system a free trial?

4. May a Federal appellate court, without any contrary evidence before it, uphold a discriminatory state statute prospectively when it is proven conclusively and conceded by the state that the purported rational basis for the statute does not exist?

PARTIES TO THE PETITION

This is a class action in which the petitioning parties are Donna M. Murillo and more than 25,000 other New Jersey matrimonial litigants who were denied a trial by a discriminatory state statute unless they paid a $50 or $60 trial fee which no other litigant had to pay. The total amount of those fees at present held in escrow and collecting interest, is about $2 million.

The respondent is Lewis W. Bambrick, Clerk of the Superior Court of New Jersey, recipient of funds paid to the Superior Court, who represents the interests of the State of New Jersey.

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IN THE
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OCTOBER TERM, 1982

DONNA M. MURILLO, ET ALS,

Petitioners,

vs.

W. LEWIS BAMBRICK, CLERK OF
THE SUPERIOR COURT OF NEW JERSEY,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Arthur Uscher, Esq., on behalf of Donna M. Murillo and more than 25,000 New Jersey matrimonial litigants comprising the petitioning class, petitions for a Writ of Certiorari to review a 2-1 judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit (Appendix A, infra, 1a to 41a) is reported at 681 F.2d 898 (1982). The opinion of the District Court (Appendix B, infra, 42a to 76a) is reported at 508 Fed. Supp. 830 (D.C.N.J. 1981).

JURISDICTION

On June 17, 1982, in a two-to-one decision, the Court of Appeals for the Third Circuit reversed a judgment of the United States District Court for the District of New Jersey which had previously held that N.J.S. 2A:34-16, now repealed, was unconstitutional. (Appendix C, infra, 77a). Judges Adams and Rosenn voted to reverse. Judge Sloviter dissented. A Petition for Rehearing En Banc was denied on July 12, 1982, with Judges Gibbons, Higginbotham and Sloviter recorded as favoring a rehearing.

(Appendix D, infra, 78a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution provides in relevant part:

> "No State shall make or enforce any law which shall... deny to any person within its jurisdiction the equal protection of the laws."

2. N.J.S. 2A:34-16, now repealed, provided that:

> "Except in actions in forma pauperis, before any matrimonial action is approved for trial the plaintiff or counterclaimant shall pay to the Clerk of the Superior Court, for the use of the State, the sum of $50.00 and in litigated actions the additional sum of $10.00."

3. New Jersey Rule 4:79-2, now deleted, provided that:

> "Except as otherwise provided by R.1:13-2 (relating to actions brought by indigents), before any matrimonial action is approved for trial, the plaintiff or counterclaimant shall deposit with the Clerk a sum of $50.00 and in litigated actions the additional sum of $10.00 for stenographic fee. The aforesaid fees together with the request for an approval for a trial of the matrimonial action shall be forwarded to the Clerk within thirty days of the entry of default or the service of a pleading contesting the action."

PRELIMINARY STATEMENT

The equal protection clause of the 14th Amendment of the U. S. Constitution has been gutted and left for dead on the streets of Philadelphia by the majority decision in this case.

Petitioner uses this strong language seriously because the reasoning in the majority opinion flies in the face of equal protection law as it has been developing since Royster v. Guano, 253 U.S. 412 (1920); and particularly in the recent cases of Western & S.L.I. Co. v. Bd. of Equalization, 68 L.Ed2 514 (1981); Schweiker v. Wilson, 450 U.S. 221 (1981); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981), and U.S. Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980).

Even more at odds with 14th Amendment equal protection law enunciated by the U. S. Supreme Court, is the majority's decision holding that once a governmental attorney or the court itself has fantasized a purported hypothetical rational basis for a discriminatory statute, not even admissions by the state and its legislature that the purported rational basis is, in fact, non-existent will cause the discriminatory statute to be declared unconstitutional, even prospectively.

STATEMENT OF THE CASE

In 1979, Petitioner, Donna M. Murillo's marriage had deteriorated to the point where only a divorce gave her any hope for any happiness at all in her future life. Having met all of the legal requirements entitling her to a divorce under New Jersey law, she filed the required Complaint in the New Jersey Superior Court, paying the same filing fee (then $60) that every other litigant paid to file a Complaint in that Court.

Although every other litigant (tort, probate, contract, jury, non-jury) would then automatically move up the Superior Court trial list and eventually have a trial, Donna Murillo would not. She was a divorce litigant, and because of that alone, she was denied a trial unless she paid the Clerk of the Superior Court an additional $50 or $60 as a trial fee. This additional discriminatory fee was required by the challenged statute N.J.S. 2A:34-16 and New Jersey Court Rule 4:79-2, which supported it.

This denial of trial denied Donna Murillo the right to a divorce because without a trial (even if it took only 5 minutes) Donna Murillo could not be divorced even though she met all substantive requirements entitling her to a divorce under New Jersey law.

Although during argument, the state said $50 was not a lot of money, it was to this Petitioner and probably hundreds, if not thousands of others among the 25,000 in this class. Petitioner was a domestic and earned $25-$28 per day. Even though she might have followed the in forma pauperis route, she was old-fashioned and proud and wanted to pay her own way. She did so by paying the $60 complaint filing fee paid by all, but rebelled at paying the discriminatory divorce trial fee.

Petitioner, therefore, brought this suit in the Federal District Court for the District of New Jersey to declare N.J.S. 2A:34-16 unconstitutional on 14th Amendment equal protection grounds. Jurisdiction was invoked under 28 U.S.C. 1343 (3), (4).

The Federal District Court pushed for an early trial of the case so that if the statute were found unconstitutional, the state would be prohibited as soon as possible from digging illegal divorce trial fees out of the pockets of its residents.

However, the state asked the Federal District Court to defer to the state legislature which was then seriously considering repealing N.J.S. 2A:34-16 so that the legislature would not be embarrassed by the Federal Court finding the statute unconstitutional. The state asked for a delay so that the legislature could act.

The court acceded to the state's request but ordered all divorce litigants required to pay a trial fee from the date of the suit filed by Petitioner to be included in a class and further ordered that the divorce trial fees forwarded to the Clerk of the Superior Court be kept in an escrow account, drawing interest, pending outcome of the suit.

During all of these proceedings the District Court told the state that it would consider it a "most unkind act" should the Court delay taking action so the state legislature could repeal the act, if the state would then come back into Court to ask for the funds which the District Court had been, in effect, "sandbagged" into permitting the state to collect in escrow during this period of delay. This is actually what the state has done.

It should be noted that between the time the Federal District Court did the state a favor by granting its request for delay and the time N.J.S. 2A:34-16 was actually repealed by the state legislature, more than 25,000 divorce litigants were admitted to the class and had their funds held in escrow by the Clerk of the Superior Court which sum, together with interest, now totals about $2 million dollars.

At the time of trial, in response to discovery, the state had set forth four purported factual statements which the state alleged were reasonably and rationally related to the legislative objective of N.J.S. 2A:34-16. The gist of the first three basically was that the judges of the Superior Court and the Clerk of the Superior Court and his staff, spent more time on matrimonial than on other types of cases. The fourth factual basis was, "Trial fee encourages reflective thought."

When the case came on for trial the state's own statistics, prepared by the

Administrative Office of the Courts, showed that, in fact, matrimonial cases cost substantially less to administer and to try than did all other types of cases in the Superior Court of New Jersey.

With this information in hand and entered into evidence as a joint exhibit, the state then formally withdrew its allegations that the factual basis for the trial fee to matrimonial litigants was more judge and administrative time and left only the remaining purported rational basis that "Trial fee encourages reflective thought."

After plaintiff put in evidence showing the genesis of the trial fee statute and that it no longer had any reason for existence, the plaintiff rested. The state put in no evidence whatsoever.

The trial court found that the statute in question was in fact discriminatory without rational basis or legitimate legislative objective and ordered the escrow funds held by the Clerk of the Superior Court to be returned to the more than 25,000 divorce litigants who had wrongfully been required to pay them.

The state then appealed the trial court decision to the Third Circuit Court of Appeals on a wholly new ground which had not been raised below (see U.S. v. Ortiz, 442 U.S. 841 (1975), i.e., that the state legislature in saving N.J.S. 2A:34-16 from repeal in 1971, could have reasonably believed that it would cost more to administer the new "no-fault" matrimonial law and, therefore, the statute was constitutional. There was not a smidgin of evidence in the case to support such a speculation about what the state legislature thought or might have thought, in 1971.

The majority of the Court of Appeals bought this argument and embellished it with hypotheticals and fantasies of their own even though it was clearly proven at trial that it actually cost substantially less, not more, to administer matrimonial cases.

REASONS FOR GRANTING WRIT

THE THIRD CIRCUIT MAJORITY DECISION CONFLICTS WITH THE LAW OF THIS COURT AND OTHER CIRCUITS BY NOT APPLYING STRICT SCRUTINY TO A STATE STATUTE DENYING A FUNDAMENTAL RIGHT.

This case is the perfect vehicle for this Court to establish once and for all whether the right to divorce is a fundamental constitutional right. The Court has picked around this issue in a line of cases which indicate that the right to divorce is fundamental, but which has made no definitive statement that it is.

The uncertainty raised by this issue is a major cause of this appeal and probably leads to much unnecessary litigation throughout the nation.

The right to marriage has been firmly established by this Court as a fundamental right. Petitioner urges that concomitantly and logically the right to a divorce should clearly be recognized by this Court as a fundamental right which is imbedded in our

Constitution. Zablocki v. Redhail, 434 U.S. 374 (1978); United States v. Kras, 409 U.S. 434 (1973); Boddie v. Connecticut, 401 U.S. 371 (1971); and Loving v. Virginia, 388 U.S. 1 (1967).

As stated in Boddie, supra, at 376: "marriage involves interests of basic importance in our society"; see Loving v. Virginia, supra; Skinner v. Oklahoma, 316 U.S. 535 (1942); Meyer v. Nebraska, 262 U.S. 390 (1923); and the right to a divorce is the "adjustment of a fundamental human relationship", Boddie v. Connecticut, supra, at 383.[1]

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[1] See also United States v. Kras, supra, where the Court concluded that filing fees in bankruptcy actions did not deprive indigents of due process or equal protection. Boddie was distinguished primarily because:

> "The denial of access to the judicial forum in Boddie touched directly... on the marital relationship and on the associational interests that surround the establishment and dissolution of that relationship. On many occasions we have recognized the fundamental importance of these interests

The trend toward declaring divorce a fundamental right was reaffirmed in Zablocki v. Redhail, supra, at 384, where the Court stated that the "right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause."...and that the "decision to marry is among the personal decisions protected by the right of privacy."

"Because the right to marry inheres in the right to privacy, and the Court has recognized that 'it would make little sense' to recognize a right of privacy with respect to some but not all matters of family life, see Zablocki v. Redhail, supra, at 386, it follows that the same considerations apply to the right to dissolve the marriage relationship." Appendix A, Page 32a, Judge Sloviter dissenting, "Both logic and practi-

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under our Constitution. See, for example, Loving v. Virginia...", U.S. v. Kras, supra, at 444.

cality require that marriage and divorce be considered correlative." Appendix A, Page 32a, Judge Sloviter dissenting.[2]

In line with the above cases, the majority arguably concedes that the "right to divorce" may be a fundamental right which would trigger the heightened scrutiny test of the Equal Protection Clause. Appendix A, Page 8a, Majority. However, the majority erroneously concludes that the right to divorce was not at issue in this case because the matrimonial trial fees "did not significantly, directly, or substantially infringe upon the right of individuals to obtain dissolutions of their marriages." Appendix A, Page 9a, Majority.

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[2] "A liberal right to divorce may be a prerequisite to full exercise of the right to marry; to the extent divorce is unavailable, the right to remarry is burdened... The liberty and privacy interests in obtaining freedom from an unsatisfactory relationship are sufficiently strong to justify constitutional protection of divorce..." Developments in the Law: The Constitution and the Family, 93 Harv. L. Rev. 1156, 1311 (1980).

That conclusion is wrong because the majority reaches it "in the face of the contrary findings of the district court" where that court found that since the petitioner, Donna Murillo, worked as a domestic earning $25.00 to $28.00 a day, "the State of New Jersey had thus placed [Murillo] in a dilemma: either she would have had to pay what was to her a substantial sum to sue for divorce; or she would have remained hostage to a marriage which under the substantive law of the State she was entitled to have dissolved." (Appendix A, Pages 34a to 35a, Judge Sloviter dissenting).

As Judge Sloviter further points out in her dissenting opinion (Appendix A, Page 35a), in determining whether N.J.S. 2A:34-16 infringed upon one's right to a divorce, "I would look both to the district court findings and the undisputed fact that the matrimonial fee penalized each New Jersey resident (with the exception of indigents) who sought to exercise his or her right to obtain a divorce. These evince a sufficiently direct and sweeping burden on a fundamental right to subject the classification to heightened judicial scrutiny."[3]

If a statute impinges upon fundamental freedoms protected by the Constitution, the statutory classification must, under the equal protection clause, be necessary to the achievement of a compelling state interest. Illinois State Board of Election v. Socialist Workers Party, 440 U.S. 173 (1979); Zablocki v. Redhail, supra; San Antonio Independent

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[3] Total preclusion is not a prerequisite to invocation of strict scrutiny. "It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution...". Shapiro v. Thompson, 394 U.S. 618 (1969); and Oregon v. Mitchell, 400 U.S. 112 (1970).

In Shapiro, where the issue was a durational residence requirement as a prerequisite prior to qualifying for welfare benefits, the Court found no need to dispute the "evidence that few welfare recipients have in fact been deterred [from moving] by residence requirements." Id. at 650. In fact, none of the litigants in Shapiro had themselves been deterred from receiving welfare benefits. See also Dunn v. Blumstein, 405 U.S. 330 (1972).

School District v. Rodriguez, 411 U.S. 1 (1973); and Eisenstadt v. Baird, 405 U.S. 438 (1973). In essence, the statutory classification can be upheld only if it is "supported by sufficient state interests" which are "closely tailored to effectuate only those interests." Carey v. Population Services Int'l., 431 U.S. 678 (1977); and Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974).

Here, the matrimonial fees cannot be necessary or "closely tailored" to defray the higher costs of divorce actions when, as a factual matter, those higher costs do not exist. (See Appendix A, Page 40a, Judge Sloviter dissenting). "The State produced no evidence that there was any basis to charge a matrimonial litigant a higher fee; it ultimately abandoned the argument that there was any empirical basis for such a higher fee, and in fact it is currently charging all litigants the same general filing fee, which it increased from $60 to $75 in 1981 'to adjust for the elimination of the matrimonial fees and to compensate for inflationary pressure'." (Appendix A, Page 41a, Judge Sloviter dissenting).

Because the matrimonial trial fees affect the exercise of petitioners' fundamental right to divorce, N.J.S. 2A:34-16 must fall since it cannot withstand the heightened scrutiny review of the Equal Protection Clause.

EVEN WERE THE COURT NOT TO CONSIDER DIVORCE A FUNDAMENTAL RIGHT THE THIRD CIRCUIT MAJORITY UPHELD THE CONSTITUTIONALITY OF A DISCRIMINATORY STATUTE WITHOUT ANY RATIONAL BASIS FOR IT.

The decision of the majority of the Court of Appeals flies in the face of the Third Circuit's own decisions (see footnote 4) and makes a mockery of the "rational basis review" of the Equal Protection

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[4] The majority's decision even runs afoul of the Third Circuit's next most recent equal protection decision, Delaware River Basin Comm. v. Bucks County Water & Sewer Auth., 641 F.2d 1087 (3rd Cir. 1981) where the Court stated that when reviewing a classification under the rationality test, the court must conduct a two-step analysis:

> "First, it should identify the purposes of the statute and assure itself that these purposes are legitimate; ordinarily this inquiry will involve examination of statements of purpose and other evidence in the legislative history. Second, having identified the governmental purposes, the court must determine whether the classification is rationally related to the achievement of these goals."

Clause. The rational basis review is by no means a "toothless one", Matthews v. Lucas, 427 U.S. 495, 510 (1976), and at least requires that the legislation classify the persons it affects in a manner rationally related to "legitimate articulated state purposes". San Antonio Independent School District v. Rodriguez, supra; Schweiker v. Wilson, supra; Vance v. Bradley, 440 U.S. 93 (1979), and Matthews v. DeCastro, 429 U.S. 181 (1976).

The Court then went on to state:

> "A statute's classifications will invariably be rationally related to a purpose so defined since the 'purpose' is, in effect, a restatement of the classification. To engage in hypothesizing however, would be to render the rational basis standard no standard at all. As Justice Stevens noted while concurring in United States Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980), 101 S.Ct. 453, 461-462, 66 L.Ed.2d 368 (1980): 'If the analysis of legislative purpose requires only a reading of the statutory language in a

In essence, a classification under the rational basis test will be sustained only if it "rationally furthers the purpose identified by the State". Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314, (1976); San Antonio School District v. Rodriguez, supra, and Johnson v. Robinson, 415 U.S. 361 (1974).

Over the last decade, the United States Supreme Court has frequently recognized that the actual purpose of Congress (or the State), rather than post hoc justifications offered by government attorneys, must be the primary basis for analysis under the rational basis test.

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disputed provision, and if any "conceivable basis" for a discriminatory classification will repel a constitutional attack on the statute, judicial review will constitute a mere tautological recognition of the fact that Congress did what it intended to do'."

G.D. Searle & Co. v. Cohn, -US-71 L.Ed2 250 (1982); Western & S.L.I. Co. v. Bd. of Equalization, supra; Schweiker v. Wilson, supra; Minnesota v. Clover Leaf Creamery Co., supra; U.S. Railroad Retirement Board v. Fritz, supra; Massachusetts Bd. of Retirement v. Murgia, supra; Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Johnson v. Robinson, supra; U.S.D.A. v. Moreno, 413 U.S. 528 (1973), and McGinnis v. Royster, 410 U.S. 263 (1973).

In the case at bar, the legislative objective advanced in support of N.J.S. 2A:34-16 was that the matrimonial trial fees were necessary to defray the cost of matrimonial actions in the Superior Court. But that legislative objective, as conceded by the State itself, was wrong! It was wrong in 1971, when the New Jersey Legislature failed to repeal the statute, and continued to be wrong for the next nine years.

During the 9-year period, the State wrongly collected millions upon millions of dollars from matrimonial litigants to defray a certain "cost" which "cost" never existed! To this, the Third Circuit majority astonishingly states that nine years is "not an unreasonable period" for a defective statute to penalize the matrimonial litigants of the State of New Jersey (Appendix A, Page 26a).

Assuming, but only for the sake of this argument, that the legislative objective of defraying the "cost" of matrimonial actions "could have reasonably" been contemplated by the legislature in 1971, is that legislative objective etched in stone to the extent that N.J.S. 2A:34-16 can never become unconstitutional - even when the State concedes that such a "cost" never existed?

It seems that the majority placed too much emphasis on attempting to justify the "cost" and "not enough emphasis on the fundamental question of whether the [classification of matrimonial litigants under N.J.S. 2A:34-16] is substantially related to the achievement of that goal." Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981), Justice Brennan dissenting.

What makes the decision of the majority even more perplexing is that the State's legislative objective, besides being wrong, is totally unsupported by any evidence whatsoever. Nowhere is there any evidence of any kind to even offer the slightest suggestion that this legislative objective was contemplated by the New Jersey Legislature. Why? Because there is no such evidence. The idea for the purported legislative objective was conjured up by the state's appellate counsel and, for some reason, embellished by the majority.

Furthermore, the only documented evidence in this case which sheds any light on the "actual" legislative objective of N.J.S. 2A:34-16 is set forth by the New

Jersey legislature itself in the statement accompanying the repealer of the fee statute in 1980:

> "In the past, the $50.00 or $60.00 differential required for matrimonial cases was justified by an additional review provided in such cases by a standing master who determined whether or not the matter was fit for trial. Today, no similar review exists to justify any such differential in fees. As a result, these approval fees for matrimonial cases have been questioned as an unreasonable classification in an action pending before the Federal District Court. The elimination of these fees would thus serve to eliminate an anachronism from the Court's fee structure."

The majority chose to reject this clear legislative language and substituted its own totally hypothesized legislative objective which has no basis in any evidence. As Judge Sloviter stated in her dissenting opinion, "I see no reason why the majority's hypothetical rationale for the special matrimonial fee should be preferred over that given by the legislature itself". Appendix A, Page 39, fn 4.[5]

Although the quotes below are dissenting opinions of cases which are distinguishable from this one, Justice Powell, with whom Justice Brennan, Justice Marshall and Justice Stevens joined, seemed to have this case in mind in Schweiker v. Wilson, supra, when they stated:

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[5] Under the system of government created by our Constitution, it is up to the legislature, not the courts, to decide the wisdom and utility of legislation." Ferguson v. Skrupa, 372 U.S. 726 (1963).

Courts cannot substitute their social and economic beliefs for the judgment of legislative bodies. Minnesota v. Clover Leaf Creamery Co., supra (1981), and Kahn v. Shevin, 416 U.S. 351 (1975).

> "When a legitimate purpose for a statute appears in the legislative history or is implicit in the statutory scheme itself, a court has some assurance that the legislature has made a conscious policy choice... But _when a legislative purpose can be the ingenuity of a government lawyer litigating the constitutionality of a statute_, a reviewing court may be presented not so much with a legislative policy choice as its absence.
>
> "In my view, the Court should receive with some skepticism _post hoc_ hypotheses about legislative purpose, unsupported by the legislative history."

Similarly, in _U.S. Railroad Retirement Board v. Fritz_, supra, Justice Brennan with whom Justice Marshall joined, stated:

> "This Court will no longer sustain a challenged classification under the rational basis test merely because Government attorneys can suggest a 'conceivable basis' upon which it might be thought rational ...Where Congress has expressly stated the pur-

> pose of a piece of legislation, but where the challenged classification is either irrelevant to or counter to that purpose, we must view any post hoc justifications proffered by Government attorneys with skepticism. A challenged classification may be sustained only if it is rationally related to achievement of an actual legitimate governmental purpose.

If the constitutional validity of a statute is going to depend on the imagination of the State's counsel, then our Constitution is in deep trouble!

CONCLUSION

Equal protection and strict scrutiny are bulwarks of constitutional law which this court and all of the U. S. Circuit Courts of Appeals (including the Third Circuit itself) have spent generations refining and establishing. The majority decision which is the subject of this petition is a throwback to the Dark Ages of constitutional thinking and cannot be allowed to stand as precedent without a thorough review by Your Honorable Court.

Respectfully submitted,

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ARTHUR USCHER, ESQ.
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Attorney for Petitioners,
DONNA M. MURILLO, et als

DATED: September 24, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1786

DONNA M. MURILLO

v.

W. LEWIS BAMBRICK, Clerk of the Superior
Court of New Jersey,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
C.A. No. 79-2345

Argued October 29, 1981
Before: ADAMS, ROSENN, and SLOVITER, *Circuit Judges*
(Filed June 17, 1982)

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OPINION OF THE COURT

ADAMS, *Circuit Judge*.

In this appeal, we are asked to review an order of the district court holding unconstitutional a New Jersey statute and court rule, both now repealed, that assessed higher filing fees in matrimonial actions than in other civil cases. Unlike the district court, we conclude that the Constitution of the United States was not violated by the State's imposition of a "trial fee" upon individuals seeking divorces, but not upon other civil litigants. Whatever the wisdom of New Jersey's legislation, in our view the classification at issue here neither contravened a fundamental interest, so as to trigger heightened scrutiny, nor constituted an act devoid of rationality, so as to fall short of the minimal requirements for orderly government. Accordingly, we reverse.

I

On June 18, 1979, plaintiff Donna Murillo, a resident of New Jersey, filed for a divorce in New Jersey Superior Court and paid the sixty-dollar filing fee required of all complainants in that court. Because hers was a matrimonial action, N.J.S.A. 2A:34-16 and N.J. Court Rule 4:79-2 applied.[1] According to these provisions, di-

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[1] N.J.S.A. 2A:34-16 (West) (repealed 1980) provided that

[e]xcept in actions in forma pauperis, before any matrimonial action is approved for trial the plaintiff or counterclaimant shall pay to the clerk of the superior court, for the use of the state, the sum of $50 and in litigated actions the additional sum of $10. N.J. Court Rule 4:79-2 (deleted 1980) elaborated upon this statutory requirement:

> Except as otherwise provided by R[ule] 1:13-2 [relating to actions brought by indigents], before any matrimonial action is approved for trial the plaintiff or counterclaimant shall deposit with the clerk the sum of $50 and in litigated actions the additional sum of $10 for stenographic fee. The aforesaid fees together with the request for approval for tri-

vorce actions commenced by litigants such as Murillo, even if uncontested, were not listed for trial until an additional fifty-dollar fee, applicable only to matrimonial actions, had been paid. If such an action were contested, an additional ten-dollar payment, designed to cover the cost of stenographic services, was necessary. Murillo, on behalf of herself and all others similarly situated, filed this suit in the district court, seeking a declaration that the special matrimonial litigation fee imposed by New Jersey violated the equal protection clause of the fourteenth amendment.

After certifying the case as a class action, the district court, at the suggestion of the State, stayed further proceedings in order to provide the New Jersey Legislature with an opportunity to review the matrimonial fee arrangement. So that the resulting delay would not prejudice the plaintiffs, however, the court ordered defendant W. Lewis Bambrick, Clerk of the Superior Court of New Jersey, to deposit all such fees collected after September 6, 1979, in a separate interest-bearing account. On August 1, 1980, the Legislature repealed N.J.S.A. 2A:34-16, effective September 1, 1980,[2] and shortly thereafter, the State's Supreme Court deleted N.J. Court Rule 4:79-2. The Legislature's repeal of the matrimonial fee was prospective only, however: no provision was made for the return of the fees held in escrow pursuant to the district court's order. It is this fund, consisting of fees collected after the institution of this action and currently amounting to approximately $1.5 million, that is the subject of the present dispute.

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al of the matrimonial action shall be forwarded to the clerk within 30 days of the entry of default or the service of a pleading contesting the action.

[2] 1980 N.J. Sess. Law Serv., ch. 80, §4. The Legislature simultaneously raised the general filing fee for all civil actions from $60 to $75, in order "to adjust for the elimination of the matrimonial fees and to compensate for inflationary pressures." *Id.* at 271.

Following the Legislature's action, the district court reopened the case and, after a two-day trial, concluded that the divorce trial-fee arrangement violated the equal protection clause. *Murillo v. Bambrick*, 508 F. Supp. 830 (D. N.J. 1981). After determining that the applicable standard for evaluating the legislation was the rational basis test, the district judge held that the statute was "not a rational means to further any articulated state interest." *Id.* at 833. Specifically, the court found that the first justification urged by the State, that "the additional fees helped pay for the additional court resources required for matrimonial cases," was empirically incorrect. *Id.* at 835-36. As to the State's second proffered justification, that the divorce fees "served the State's legitimate interest in 'not encouraging' divorces," the court found that, at least since New Jersey's adoption of a "no-fault" divorce system in 1971, "the purpose to discourage divorces has not existed." *Id.* at 835, 838. The district court therefore ordered that the fees held in escrow by defendant Bambrick be refunded with interest to the appropriate individuals, but stayed that directive pending the State's appeal.

II

Although the underlying dispute in this appeal may appear to involve a narrow and relatively unimportant statute, since repealed, we believe that the district court's decision raises important questions about the nature of judicial review under the equal protection clause. It is appropriate, therefore, to commence our analysis with a consideration of general principles.

In large part, legislative acts classify; by their very nature, they draw distinctions between groups of individuals and among various forms of human endeavor.[3] A legislative act, therefore, cannot be deemed invalid merely because it treats different persons or different activities differently. Instead, some general standard as to the permissibility of legislative distinctions must be identified and applied, lest a considerable portion of our laws be disapproved in a relentlessly logical, but ultimately self-defeating, pursuit of abstract equality.

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[3] *See* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341, 343-44 (1949); *see also* Martin v. Struthers, 319 U.S. 141, 154 (1943) (Frankfurter, J., dissenting) ("[t]he right to legislate implies the right to classify"); Choper, *Economic and Social Regulations and Equal Protection*, in The Supreme Court: Trends and Developments 1980-1981 at 1 (D. Opperman ed. 1982).

The fourteenth amendment, in providing that no state shall "deny to any person within its jurisdiction the equal protection of the laws," has been construed to set out such a standard. This "equal protection clause" has never been interpreted so as to strike down all legislative efforts that do not apply "to all persons at all times and in all places," *Trimble v. Gordon*, 430 U.S. 762, 785 (1977) (Rehnquist, J., dissenting). Rather, "recognition of the inevitability and indeed the justice of some line-drawing [has made] the central task of equal protection theory one of determining which lines or distinctions are permissible." Fiss, *Groups and the Equal Protection Clause*, 5 Phil. & Pub. Aff. 107, 109 (1976). Toward this end, in the course of several decades of constitutional litigation, the equal protection standard has come to be thought of as primarily two-tiered: enactments that discriminate against suspect classes or trench upon fundamental rights are disfavored, and will be tolerated only if necessary to achieve a compelling governmental interest, while statutes in the economic, social welfare, or regulatory fields are subjected to far lesser scrutiny, and will be upheld unless not rationally related to legitimate public ends.[4] With respect to a statute challenged on equal protection grounds therefore, a reviewing court is obligated initially to determine the appropriate level of judicial review, and then carefully to consider whether a sufficient showing has been made under that test so as to override the presumption of constitutionality ordinarily accorded to legislative pronouncements. The purpose of such an analysis is not to replace legislative judgments with judicial views of effective or salutary public policy; rather, it is to ensure that a legislative majority adheres to its constitutional obligation to govern its citizens fairly.

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[4] On occasion, the Supreme Court has employed an "intermediate" standard of equal protection review. Under this "middle-tiered" approach, laws that classify on the basis of certain specified, but non-suspect, characteristics — such as sex, alienage, and illegitimacy — will be accepted if substantially related to important state objectives. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976); *see generally* Blattner, *The Supreme Court's "Intermediate" Equal Protection Decisions: Five Imperfect Models of Constitutional Equality*, 8 Hastings Const. L.Q. 777, 780-800 (1981).

A

Given this backdrop, we first consider the matter of the appropriate standard of equal protection review applicable to the controversy before us today. The district court concluded that, "in this case, no suspect class or fundamental interest is present," and that therefore the rational basis test was applicable. 508 F. Supp. at 833.[5] Inasmuch as the Supreme Court thus far has declined to deem classifications based on factors other than race and national origin — and, arguably, sex, alienage, and illegitimacy, *see* note 4 *supra* — as inherently "suspect," we agree with the holding of the district court that the interests of no suspect class are involved here. Whether or not New Jersey's legislation trespasses upon a "fundamental right" is a more difficult question, however, and requires a more extended discussion.

The fundamental rights component of the equal protection clause can be traced to *Skinner v. Oklahoma*, 316 U.S. 535 (1942), in which the Supreme Court invalidated a statute providing for compulsory sterilization of "habitual" criminals, on the ground that such a rule impermissibly interfered with "one of the basic civil rights of man," *id.* at 541. Over the years, the Court has applied the fundamental interests doctrine to strike down various legislative "infringements" involving a number of "rights," such as voting, interstate travel, and access to the criminal appellate process.[6] Most recently, in *Zablocki v. Redhail*, 434 U.S. 374 (1978), a majority of the Justices, relying on a line of cases dating back to the landmark anti-miscegenation case, *Loving v. Virginia*, 388 U.S. 1 (1967), declared that "the right to marry is of fundamental importance," and held that any "statutory classification [that] significantly interferes with the exercise of [this] right . . . cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." 434 U.S. at 383, 388.

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[5] In briefs filed with this Court, neither party challenged the district court's determination in this regard. At oral argument, however, counsel for appellee suggested that New Jersey's legislation interfered with Murillo's fundamental right "to be married and to end a marriage."

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[6] *See* Illinois Elections Bd. v. Socialist Workers Party, 440 U.S. 173 (1979) (striking down requirement that new parties and independent candidates garner more signatures to be placed on municipal ballot than on state ballot); Dunn v. Blumstein, 405 U.S. 330 (1972) (voiding certain durational residency requirements for voting); Kramer v. Union Free School Dist., 395 U.S. 621 (1969) (overturning statute that restricted voting in school district elections to property owners and parents of schoolchildren); Shapiro v. Thompson, 394 U.S. 618 (1969) (invalidating a one-year residency requirement for welfare eligibility); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (invalidating state poll tax); Douglas v. California, 372 U.S. 353 (1963) (requiring states to appoint counsel to represent indigent criminal defendants in any direct appeal as of right); Griffin v. Illinois, 351 U.S. 12 (1956) (requiring states to provide trial transcripts to indigent criminal appellants). *But see, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) (refusing to designate education as "fundamental" for equal protection purposes, and holding that "wealth discrimination alone provides an [in]adequate basis for invoking strict scrutiny," *id.* at 29); Lindsey v. Normet, 405 U.S. 56 (1972) (no fundamental interest in "decent shelter"). *See generally* L. Tribe, American Constitutional Law §§16-7 to 16-12 (1978).

No decision of the Supreme Court stands squarely for the proposition that state restrictions on divorce must be evaluated under the same exacting standards as restrictions on, for example, the right to travel, the right to vote, or the right to marry.[7] Drawing upon *Zablocki* and its predecessors, it might be argued that the relevant Supreme Court cases recognize that, for purposes of equal protection analysis, some sort of heightened scrutiny is appropriate with respect to legislation impinging on the availability of divorce.[8]

Whatever the merits of this argument,[9] it should be recognized that any such "fundamental right" to secure a divorce — whether a procedural "right" of access to a judicial forum to sue for divorce or some substantive "right" to divorce per se — is not at issue in this case. Quite simply, New Jersey's statute did not "significantly," "directly," or "substantially" infringe upon the right of individuals to obtain dissolutions of their marriages (quoting *Zablocki*, 434 U.S. at 386-87). By imposing a fifty-dollar filing fee, New Jersey obviously did not prohibit its citizens from attempting to obtain a divorce in accordance with the State's standards and requirements. Nor did the fee constitute an extra obstacle to divorce, erected by the State, in addition to those

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[7] *See Developments in the Law: The Constitution and the Family*, 93 Harv. L. Rev. 1156, 1308-13 (1980) (observing that "[t]he Supreme Court has not recognized a substantive constitutional right to divorce," but recommending that divorce be given "greater protection than offered by the [*Sosna v. Iowa*] rational basis test"); *see also* Strickman, *Marriage, Divorce and the Constitution*, 22 B.C. L. Rev. 935, 978-1008 (1981).

[8] Support for such an argument focuses upon Boddie v. Connecticut, 401 U.S. 371 (1971), United States v. Kras, 409 U.S. 434 (1973), and Zablocki v. Redhail, 434 U.S. 374 (1978). *See* Strickman, *supra* note 7, at 978-88. Wholly apart from the specific language contained in *Boddie*, *Kras*, and *Zablocki*, it might also be argued that, insofar as a "right to marry" has been recognized under the Constitution, *see Zablocki*, similar protection should be afforded to individual decisionmaking with respect to divorce. *See Developments in the Law*, *supra* note 7, at 1310-11 ("A liberal right to divorce may be a prerequisite to full exercise of the right to marry; to the extent divorce is unavailable, the right to remarry is burdened").

[9] It could be argued that the *Boddie-Kras-Zablocki* line of cases does *not* stand for the proposition that divorce is a fundamental right. Although *Boddie* recognized that marriage was an important relationship, the Court, in holding that a state violated due process by denying court access to indigents unable to pay divorce filing fees, did not explicitly recognize a fundamental right to marry, much less a fundamental right to divorce. Similarly, while *Kras* might be read to support the proposition that the imposition of an absolute bar to the judicial process for the dissolution of a marriage is incompatible with the demands of the due process clause, the opinion need not be interpreted as establishing the fundamental na-

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ture of divorce for equal protection purposes. *See Developments in the Law*, *supra* note 7, at 1310. Under *Zablocki*, to be sure, the right to marry is elevated to a "fundamental" status; the *Zablocki* opinion is silent, however, as to the presence of a fundamental right to divorce.

Indeed, this counterargument continues, it is difficult to reconcile the notion that divorce laws should be subjected to heightened scrutiny with the Supreme Court's decision in Sosna v. Iowa, 419 U.S. 393 (1975). In upholding the constitutionality of Iowa's one-year residency requirement for divorce, the Court found the statute could "*reasonably* be justified" by the State's interests in not becoming "a divorce mill for unhappy spouses" and in "insulat[ing its] divorce decrees from the likelihood of collateral attack." *Id.* at 406-09 (emphasis added). Iowa's restriction on *divorce* apparently was subjected to far less rigorous scrutiny in *Sosna* (where the Court upheld a law it deemed "reasonable") than was Wisconsin's restriction on *marriage* at issue in *Zablocki* (where the Court overturned a statute that was neither "supported by sufficiently important state interests [nor] closely tailored to effectuate only those interests," 434 U.S. at 388).

Finally, it could be maintained that recognition of a fundamental right to divorce is not necessary to protect the fundamental right to marry. Under *Zablocki*, any regulation that "significantly" or "directly or substantially" interferes with decisions to remarry will be upheld only if "supported by sufficiently important state interests and . . . closely tailored to effectuate only those interests." 434 U.S. at 388. If regulations of divorce which fail the *Zablocki* test are struck down, therefore, there may be no need for a fundamental right to divorce in order to protect the right to marry.

difficulties and costs that inhere in the nature of divorce. Rather, New Jersey's statutory scheme provided for ready access to divorce in appropriate cases, but deemed divorce to be a service which should be paid for at least in part by each individual who sought to obtain it. Such a determination did not constitute an infringement on any "right" to sue for or to obtain a divorce. Instead, it reflected an apparent judgment that the costs of exercising that right, like the costs of exercising many constitutionally protected rights, would not be borne entirely by the State merely because a constitutional right was alleged to be present.[10] To challenge such an arrangement — that is, to contend that the imposition of a fifty-dollar trial fee transgressed per se an individual's right to seek a divorce — is to assert, in effect, that a constitutional right to a divorce would necessarily entail a concomitant constitutional obligation on the part of a state to subsidize the full costs of providing applicants with divorces. The argument, reduced to its essence, amounts to an assertion that individuals have not only a fundamental right to divorce, but a fundamental right to a free divorce despite the very real costs to the State of providing that service. Even if we assume *arguendo* that there exists a fundamental right to divorce, we do not believe, and we are aware of no case suggesting, that a state is constitutionally required not only to grant divorces to its citizens upon request, but to do so without collecting from those persons a portion of the expenses realized in making available to them such a service.[11]

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[10] According to statistics produced by the State at trial, *see* Defendant's Trial Exhibit D-1, and credited by the district court, *see* 508 F. Supp. at 836 & 836 n.10, during fiscal year 1979, in disposing of 26,275 matrimonial cases, New Jersey expended approximately $5.70 million for judicial and staff salaries and fringe benefits, clerk's office expenses, court reporter fees, and general administrative costs. $3.02 million of this amount was recouped through the payment by divorce litigants of general filing and divorce trial fees. In other words, matrimonial litigants contributed only 53% of the total costs incurred by the State in providing a forum for its citizens to obtain a divorce. We are not presented, therefore, with a situation where a state assesses a fee significantly greater in amount than the cost of the service being provided.

An additional consideration might be present if it were demonstrated that the fee arrangement discouraged indigents from obtaining a divorce by imposing a financial requirement that they would find impossible to satisfy. Such is not the case here: the statute in question contained an explicit exemption for persons unable to afford the fee.[12] Moreover, nothing in the record indicates that any member of the class represented by Murillo was prevented from becoming divorced or remarried by reason of the State's divorce-fee system. To be sure, even non-indigent individuals may have found that the divorce fee required them to forego other uses to which they would have put their limited financial resources.[13] But this hardship, although unfortunate, falls short of establishing that such persons have been precluded from obtaining divorces. It does show that the choice to file for a divorce might have been somewhat easier if New Jersey subsidized a greater portion of the costs of divorce. Again, however, we are not persuaded that any fundamental right to a divorce carries with it what in essence would have to be the right to a divorce that is free to the litigant. Furthermore, if the burden of the fifty-dollar divorce fee were deemed an encroachment on a non-indigent's right to obtain a divorce, there is no reason why a similar objection could not be registered against the seventy-five-dollar *filing* fee currently required of all litigants, including matrimonial litigants, who seek resolution of their disputes in New Jersey's Superior Courts. Indeed, it is difficult to understand why the fifty-dollar fee would constitute any more of a "significant," "substantial," or "direct" encumbrance on an individual's "right" to a divorce than does the very fact that New Jersey requires every party to a divorce to submit to public, sometimes lengthy, and occasionally burdensome legal proceedings in the first place.

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[11] *Cf.* Harris v. McRae, 448 U.S. 297, 316 (1980) (holding that, even though Roe v. Wade, 410 U.S. 113 (1973), and its progeny recognized a woman's right to secure an abortion under certain conditions, "it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices"); *see also* Maher v. Roe, 432 U.S. 464 (1977).

[12] *See* N.J.S.A. 2A:34-16 (repealed 1980). It is the presence of this exemption for indigents that distinguishes New Jersey's statute from the filing fee arrangement invalidated by the Supreme Court in Boddie v. Connecticut, 401 U.S. 371 (1971).

[13] At the time Murillo instituted these proceedings, "she earned twenty-five to twenty-eight dollars per day as a domestic, and did not qualify as an indigent." 508 F. Supp. at 832. According to the district court, New Jersey "had thus placed plaintiff in a dilemma: either she would have had to pay what was to her a substantial sum to sue for divorce; or she would have remained hostage to a marriage which under the substantive law of the State she was entitled to have dissolved." *Id.*

Finally, it might be maintained that New Jersey trespassed upon its citizens' fundamental right to divorce — assuming, once again, that such a right exists — by imposing the supplemental trial fee on matrimonial litigants, but not on other civil litigants. This contention suffers from a logical flaw, however. A divorce action and, for example, a tort or contract action, obviously are not interchangeable alternatives. The higher cost for a divorce, as opposed to other civil actions, would hardly encourage those seeking a divorce to abandon their efforts in favor of other, less expensive forms of litigation. The level of the fee charged for, say, a tort action, therefore, is irrelevant to the presence of any burden on the right to obtain a divorce.[14] Rather, the dispositive question — having nothing to do with a state's overall posture in regard to the imposition of filing fees — is whether a fundamental right is infringed when a state charges an individual at least some amount of money in order to defray the costs of terminating his or her marital relationship. And this question we have answered in the negative.

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[14] A different situation might be presented if a state were subsidizing at uneven rates two alternatives where the choice between those alternatives was constitutionally protected. Even were that the case here, however, it is not clear that the State would be

Accordingly, we hold that the statute under attack in this proceeding need not be evaluated under the heightened standard appropriate for legislation that infringes on fundamental constitutional rights. We proceed, therefore, as did the district court, to assess the constitutionality of the legislation under the "rational relation" standard of equal protection review.

B

Having determined that New Jersey's statute poses no interference with a fundamental right sufficient to invoke rigorous scrutiny, the rational basis test becomes, in our view, the appropriate standard by which to measure the legislation for purposes of plaintiffs' equal protection challenge. *See Schweiker v. Wilson*, 450 U.S. 221 (1981). The rational basis test simply requires "that legislation classify the persons it affects in a manner rationally related to legitimate governmental objectives." *Id.* at 230.[15] According to the district court, the supplemental

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deemed to have infringed on the right to make that choice. *See* Harris v. McRae, 448 U.S. 297 (1980) (holding that the federal government may subsidize childbirth without also subsidizing abortion); *see also* Maher v. Roe, 432 U.S. 464 (1977).

[15] The deference accorded legislators under the rational basis test was perhaps most strongly stated in McGowan v. Maryland, 366 U.S. 420 (1961): "A statutory discrimination will not be set aside if any state *of facts reasonably may be conceived* to justify it." *Id.* at 426 (emphasis added). *See also* Hodel v. Indiana, 452 U.S. 314 (1981): "Social and economic legislation [that] does not employ suspect classifications or impinge on fundamental rights . . . carries with it a presumption of rationality that can only be overcome by a *clear showing* of arbitrariness and irrationality." *Id.* at 331-32 (em-

trial fee previously imposed by New Jersey on divorce litigants does not pass constitutional muster even under the rational relation standard of review. We disagree; we do not believe that "the varying treatment of different groups or persons" challenged here "is so unrelated to the achievement of any combination of legitimate purposes that [a court] can only conclude that the legislature's actions were irrational," *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

NOTE —*(Continued)*

phasis added). Judicial review under the rational relation standard has never been entirely "toothless," however. *See, e.g.*, Jimenez v. Weinberger, 417 U.S. 628 (1974) (Social Security statute held unconstitutional, despite application of mere rationality test, because evidence did not justify differential treatment of two similarly situated groups of illegitimates); United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 538 (1973) (food stamp statute invalidated because proffered justifications were "wholly without any rational basis"); *see also* Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975) ("[t]his Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation").

In recent decisions, the Supreme Court has demonstrated some uncertainty as to the precise nature of rational relation review. While some Justices, following Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911), would uphold a legislative classification "if any state of facts reasonably can be conceived that would sustain it," *id.* at 78, other members of the Court would require that an economic and social classification "rest upon some ground of difference having a fair and substantial relation to the object of the legislation." Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). *Compare* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980), Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981), Schweiker v. Wilson, 450 U.S. 221 (1981), *and* City of Mesquite v. Aladdin's Castle, Inc., 50 U.S.L.W. 4210, 4213 (U.S. Feb. 23, 1982). *See generally Fritz, supra*, 449 U.S. at 176 n.10 (reviewing previous rational relation cases, and suggesting that "[t]he most arrogant legal scholar would not claim that all of these cases applied a uniform or consistent test under equal protection principles"); Choper, *supra* note 3, at 3-17; Leedes, *The Rationality Requirement of the Equal Protection Clause*, 42 Ohio St. L.J. 639 (1981).

The first task of a court in evaluating an equal protection claim under the rational relation test is to identify with particularity the precise classification alleged to be irrational. Obviously, it would constitute an irrational act — and hence would offend the Constitution's promise of "equal protection of the laws" — were a state to impose differing burdens upon individuals who are, in all relevant respects, indistinguishable.[16] Plaintiffs are here challenging a New Jersey law that assessed a fifty-dollar fee against all non-indigent litigants in divorce proceedings, but not against litigants in other civil proceedings, such as tort, contract, or property actions. We must determine, therefore, whether or not persons who brought divorce actions in New Jersey were similarly situated to persons who pressed other civil complaints in the State's courts. Or, to phrase the same question somewhat differently, we must decide whether or not the New Jersey Legislature rationally could have chosen, for example, to impose higher financial obligations upon divorce litigants than on contract litigants.

After reviewing the record in this case, we are persuaded that the New Jersey Legislature did not proceed irrationally, both when it instituted the divorce fee arrangement, and when it retained that arrangement over the course of a number of decades. In light of the evidence available to it, we believe it would not have been unreasonable for the Legislature to have been of the opinion that the State's divorce system imposed financial as well as non-financial demands upon the judiciary, thereby justifying additional monetary support from the users of that system. In this connection, it is instructive to consider the origins of the supplemental fee and the place of that fee in the overall framework of New Jersey's divorce-related legislation.

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[16] For example, it would be difficult to defend as "rational" a state statute that extracted a $50 divorce fee from individuals with surnames beginning with A to M, but collected only $20 from persons whose names begin with N to Z — at least in the absence of any information that might reasonably distinguish members of the first group from members of the second with respect to matters of divorce.

For nearly the entire first half of this century, all divorce actions filed in New Jersey were referred for initial review to special masters. These masters were charged with, among other things, the responsibility for screening out fraudulent and consensual divorce cases before trial. According to the district court,

> [s]ince the State had an interest in preventing divorces on grounds other than [adultery, desertion, and extreme cruelty], it considered itself a party, albeit not in name, to every suit for divorce. The State was omnipresent, standing over the shoulders of the litigants — in the body of the advisory master — to prevent collusive divorces.

508 F. Supp. at 834. In order to finance this mastership arrangement, Chancery Court rules required litigants to make a fifty-dollar payment to the appropriate court clerk prior to requesting a hearing before a master and a trial before a chancellor. *Id.*

In 1948, the New Jersey Legislature abolished the mastership system and, at the same time, formally adopted the divorce fees at issue on this appeal. Before their cases would be set for trial, matrimonial litigants were obligated to remit fifty dollars "for the use of the state," and an additional ten dollar fee for stenographic services was imposed in "litigated" actions. No official explanation accompanied this enactment. Consequently, as the district court observed, "the exact purpose of the legislature in 1948 is now enshrouded in the mists of time." 508 F. Supp. at 834. Nonetheless, from testimony proffered at trial, the district judge concluded that

> the legislature intended that, as the system of advisory masters was abolished, the existing judicial

> structure would be required to perform tasks previously executed by the masters. The fee system created by the newly-enacted statute would institutionalize financial support for a category of cases requiring closer judicial scrutiny and a greater allocation of court resources.

Id. Even though special masters were no longer employed in divorce proceedings, the fifty-dollar trial fee could be explained, according to the district court, by reason of New Jersey's continuing interest in the oversight of all divorce suits. In short, "the 1948 statute represented a change only in procedure [and] not in substantive state policy." *Id.* The plaintiffs apparently agree with the district court's conclusion in this regard: in no way do they imply that the State's trial fee arrangement was somehow irrational or unconstitutional prior to 1971.

New Jersey's substantive law of divorce remained unchanged until 1971. In that year the Legislature amended the Divorce Act in order to give effect to a number of "no-fault" reforms.[17] Perhaps the most significant of these changes permitted the granting of a divorce upon a showing that the two spouses had not cohabitated for an eighteen-month period and that

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[17] In addition to the three existing "fault" grounds for divorce — adultery, desertion, and extreme cruelty (the latter two of which were revamped) — certain "no-fault" justifications were recognized under the amended Act: an eighteen-month separation; a twelve-month narcotic or alcoholic addiction; a twenty-four-month institutionalization; and an eighteen-month imprisonment. Additionally, a fourth "fault" provision was adopted (deviant sexual conduct), a number of common-law defenses to divorce were abolished (recrimination, condonation, and clean hands), and various revisions were made involving alimony, nullification, child legitimation, and the distribution of marital property. *See* N.J.S.A. 2A:34-1 to 34-7; Note, *The 1971 New Jersey Divorce Law*, 25 Rutgers L. Rev. 476, 479 (1971); *see also* Skoloff, *The Divorce Reform Law: A Brief Review*, N.J. L.J., Aug. 5, 1971, at 4.

"there is no reasonable prospect of [their] reconciliation." N.J.S.A. 2A:34-2(d). This proviso was intended to eliminate the potential for questionable behavior that occasionally had resulted when one party was forced to "accus[e] . . . the other of a marital wrong" in order to obtain a divorce. *Final Report to the Governor and the Legislature of the Divorce Law Study Commission* 6 (May 11, 1970). The 1971 reform legislation did not alter or affect the previously-established trial-fee arrangement, however, and for the next nine years, those fees continued to be collected from individuals who filed for divorce pursuant to the requirements of the amended Act.

The district court concluded that a "dramatic change" was wrought in New Jersey's law of divorce by the 1971 amendments — particularly because of the newly enacted eighteen-month separation provision. Whereas New Jersey prior to 1971 had "sought scrupulously to prevent the consummation of collusive divorces," after that date "the legislature abandoned this policy" and endorsed "a much more liberal conception of divorce than had theretofore existed." 508 F. Supp. at 834-35, 838. Even accepting the district judge's characterization of the 1971 Act,[18] it does not follow that the

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[18] Counsel for the State argues that the district court's characterization of the 1971 amendments is open to serious challenge. While the Legislature did indeed modify a number of the ground rules for divorce, counsel suggests that the State's paramount interest in and responsibility for matrimonial matters remained unchanged. The State, for example, specifically did not "abandon" its obligation to prevent collusive divorces; on the contrary, despite the recommendation of the Divorce Law Study Commission, the Legislature retained the defenses of laches, connivance, and collusion. *See* Note, *The 1971 New Jersey Divorce Law*, *supra* note 17, at 495-96 & n.121 (discussing N.J.S.A. 2A:34-7 as amended). Neither did the Legislature mean to suggest, as subsequent State court cases made clear, that the judiciary's only appropriate function was to rubberstamp the applications of individuals seeking dissolution of their marital bonds. *See* Rothman v. Rothman, 65 N.J. 219, 228, 320 A.2d 496, 501 (N.J. 1974); Manion v. Manion, 143 N.J. Super. 499,

Legislature acted irrationally when it retained the trial fee arrangement — and indeed, the district court did not so hold.[19] The Legislature reasonably could have believed that, even with the adoption of a more "liberal" system of divorce, divorce-related litigation would continue to impose a financial burden upon the State's judicial machinery — a burden that could be offset, in part, through the collection of a user's fee. Or, the Legislature reasonably could have believed that the increasing costs to the judicial system as a whole justified the recovery of additional monies and that an appropriate place to begin would be in the divorce field, where the litigants had already accepted and were meeting the additional cost burden. Whatever the reason, plaintiffs point to no evidence available to the 1971 Legislature from which it could have deduced that its hitherto-rational fee-assessment policy would prove unnecessary or counterproductive in the years to follow.[20]

501-02, 363 A.2d 921, 923 (Sup. Ct. Ch. Div. 1976); Morrison v. Morrison, 122 N.J. Super. 277, 281, 283, 300 A.2d 182, 184-85 (Sup. Ct. Ch. Div. 1972). According to counsel, therefore, whatever the "dramatic change" worked in New Jersey's substantive law of divorce by the 1971 amendments, nothing indicates that there was any significant lessening of either the State's considerable interest or the scope of judicial responsibility in this area. In view of our disposition of this case, we see no reason to express an opinion as to this argument.

[19] The district court condemned the trial fee arrangement on the basis of actual events that transpired *after* 1971 — events which demonstrated, in the district court's view, that "the State's belief that it was collecting these fees to defray the higher cost of providing judicial services to matrimonial litigants was [in fact] false." 508 F. Supp. at 836. Further attention is given to this portion of the district court's analysis *infra*. For present purposes, it is sufficient to note that the district court did *not* conclude that the 1971 Legislature *should have recognized* the apparent inconsistency between the substantive law of divorce it adopted and the matrimonial fee system it retained.

[20] It is not significant for purposes of our determination today that there exists no legislative history indicating why the 1971 Leg-

Even were it to be shown that the 1971 Legislature had no evidentiary basis for concluding that greater expenditures of judicial time and money were necessary for a divorce case than, for example, the average civil case, our conclusion that the State had a rational reason for retaining the supplemental fee provision would be

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NOTE —*(Continued)*

islature retained the divorce fee arrangement. While such commentary would of course be helpful were it available, *see* Schweiker v. Wilson, 450 U.S. 221, 244 & n.6 (1981) (Powell, J., dissenting), a state is under no obligation to "articulate its reasons for enacting a statute," United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980), and consequently legislative records are often sparse at the state level, *see, e.g.*, Craig v. Boren, 429 U.S. 190, 199 n.7 (1976). Although plaintiffs appear troubled by the proposition that, in the absence of legislative history, suggestions as to possible legislative motivations must necessarily be advanced by counsel for the State, we recently concluded that "[s]o long as we are careful not to attribute to the legislature purposes which it cannot reasonably be understood to have entertained, we find that in examining [a] challenged provision[] we may consider purposes advanced by counsel . . . or suggested initially by ourselves." Delaware River Basin Comm'n v. Bucks County Water & Sewer Auth., 641 F.2d 1087, 1097 (3d Cir. 1981) (footnote omitted).

In this connection, it is worth noting that the district court's requirement that the State identify a " 'legitimate, *articulated* state purpose' " that its divorce fee was intended to further, 508 F. Supp. at 834, 837 (quoting San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973) (emphasis added)), may run afoul of more recent Supreme Court pronouncements in this area. *See, e.g.*, Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 469-70 (1981) (plurality opinion) ("the search for the 'actual' or 'primary' purpose of a statute is likely to be elusive"); *Fritz, supra*, 449 U.S. at 179 ("Where . . . there are plausible reasons for [legislative] action, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision' " (quoting Flemming v. Nestor, 363 U.S. 603, 612 (1960))); *but see* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 463 n.7 (1981). *Compare* Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 682 n.3 (1981) (Brennan, J., concurring in the judgment) *with id.* at 703 n.13 (Rehnquist, J., dissenting); *see also* G. Gunther, Cases and Materials on Constitutional Law: 1981 Supplement 53 (1981) ("During the 1980-81 Term, extensive debates erupted in a unaffected.[21] The equal protection clause does not require "things which are different in fact . . . to be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1940). The Legislature, in 1971, could reasonably have determined, as Congress did with respect to the bankruptcy system, that continuation of the special fee for matrimonial litigants was appropriate in order to "make the [divorce] system self-sustaining and paid for by those who use it rather than by tax revenues drawn from the public at large." *United States v. Kras*, 409 U.S. 434, 448 (1973). In this regard, inquiry into whether the Legislature had reason to believe that

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remarkably large number of cases on the question of whether a legislature's 'actual purpose' is relevant to the constitutionality of a challenged law").

[21] It should be stressed that, in any equal protection action evaluated under the rational relation test, " 'those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.' " Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981) (quoting Vance v. Bradley, 440 U.S. 93, 111 (1979)). Plaintiffs did not satisfy their burden merely by asserting that the 1971 legislative action in question made divorce "easier and less complicated" to obtain.

The district court's protestation that the State "failed adequately to explain why matrimonial litigants alone had been singled out" when other groups of litigants — such as "[c]lass actions, actions involving minors and incompetents, [and] probate and adoption matters" — require extra judicial scrutiny, 508 F. Supp. at 837 n.11, misses the mark. It is well established that "a legislature 'may implement [its] program step by step, . . . adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations.' " *Clover Leaf Creamery Co., supra*, 449 U.S. at 466 (quoting New Orleans v. Dukes, 427 U.S. 297, 303 (1976)); *see also* Williamson v. Lee Optical Inc., 348 U.S. 483, 489 (1955); Railway Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949). Under this doctrine, New Jersey need not have adopted a trial fee system in other areas, such as class actions, in order to preserve the constitutionality of its supplemental divorce fee.

the average cost of divorce cases exceeded that of other civil cases is misplaced. Under the rational relation test, a state legislature is not obliged to arrive at exacting calculations about comparative costs and benefits before imposing a user's fee for a particular state-sponsored service. Lawmakers are not required to design fee structures with the scrupulous eye of the accountant, always matching revenues and costs. *See Vance v. Bradley*, *supra*, 440 U.S. at 110 n.28 ("'The State is not compelled to verify logical assumptions with statistical evidence'") (quoting *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 812 (1976)). Similarly, we believe that the New Jersey Legislature was not obligated to ascertain that divorce litigation was in fact more costly than other civil litigation before deciding to charge those individuals who hoped to obtain a divorce a portion of the costs incurred by the State in providing divorces.[22]

Because the Legislature has not been shown to have acted irrationally when it permitted the divorce fee arrangement to remain on the books at the time it amended the Divorce Act, we turn to a final consideration: whether that arrangement somehow "became" irrational by reason of subsequent events. In this regard, the district judge concluded that, in 1979 when this suit was filed, the matrimonial fee system could no longer be justified:

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[22] The Supreme Court on a number of occasions has rejected an equal protection challenge to a statute that imposed fees on the users of a specific judicial service. *See, e.g.*, United States v. Kras, 409 U.S. 434, 446-49 (1973) (bankruptcy filing fees permissible because they "make the system self-sustaining and paid for by those who use it rather than by tax revenues drawn from the public at large"); Ortwein v. Schwab, 410 U.S. 656, 660 (1973) (appellate court filing fee); Manes v. Goldin, 400 F. Supp. 23, 30-31 (E.D.N.Y. 1975), *aff'd*, 423 U.S. 1068 (1976) (filing fees designated for a city's general fund instead of being earmarked for support of the courts); Schilb v. Kuebel, 404 U.S. 357, 370-71 (1% administrative fee imposed on all criminal defendants seeking a bail bond).

> If it were true that prior to New Jersey's institution of no-fault divorce, matrimonial cases took up more of a judge's time than other types of cases, it is readily apparent that this is no longer the case. . . . The majority of all divorce cases are now uncontested, and plaintiffs in such cases are rarely before the judge for more than a few moments. Although a minority of actions, filed on the basis of fault, may still require special judicial scrutiny, most matrimonial litigants require no extraordinary judicial supervision. Indeed, it was demonstrated at trial that *the average cost of disposing of a matrimonial case was significantly less than the average cost of adjudicating other civil actions.*

508 F. Supp. at 836 (footnotes omitted).[23] Carrying this line of thought to its logical point of termination, the district court held that, because "the State's belief that it was collecting these fees to defray the higher cost of providing judicial services to matrimonial litigants was [demonstrably] false," *id.*, New Jersey's statute could not be reconciled with the rationality requirement imposed on states by the Constitution.

We find this aspect of the district court's analysis troubling on two grounds. First, primarily for the reasons discussed previously, we do not believe that New Jersey's divorce fee arrangement could be considered irrational simply because "the average cost of disposing of a matrimonial case was significantly less than the average cost of adjudicating other civil actions," 508 F. Supp. at 836. The relevant question, in our view, is not whether divorce proceedings were more costly than other civil cases, but rather whether the State was justified in imposing a fee upon those individuals who seek to secure a dissolution of their marriage. Absent a showing that the State's trial fee was patently exclusionary because of its very size; *see Bullock v. Carter*, 405 U.S. 134 (1972), or a showing that the State was, in effect, accumulating revenues from the fee far in excess of the amount actually spent by the State on divorce-related judicial proceedings,[24] there is no constitutional reason why New Jersey should be prohibited from collecting from litigants a substantial portion of the money it expends in providing divorce-court services. And New Jersey's scheme becomes no less rational simply because the State has chosen to collect from other civil litigants a different percentage of the costs of their respective judicial services.

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[23] Whereas divorce fees provided 53% of the costs of operating the matrimonial trial system, *see* note 10 *supra*, litigants accounted for 30% ($4.90 million in revenues out of $16.41 million in costs) of the monies spent by the State in providing courts to adjudicate general civil law and equity matters.

Second, even were we persuaded that the divorce fee arrangement could not be justified as long as divorce cases in fact are less costly than other civil matters, we could not accept the district court's application of this principle to the facts of the present appeal. By concluding, in effect, that New Jersey's Legislature acted unconstitutionally when it retained in existence a statute admittedly valid when enacted but arguably grounded on assumptions that eventually turned out to have been incorrect, the district court imposed an unwarranted obligation upon legislative bodies: the obligation constantly to reassess the continuing validity of the factual premises underlying each piece of legislation enacted over the years. Only through such a painstaking effort, apparently, could New Jersey have discovered the alleged error that developed and corrected it, thereby foreclosing the possibility of judicial intervention and invalidation.

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[24] Even in the event of this latter showing — *i.e.*, if it could be established that New Jersey used monies derived from divorce litigants in order to fund other, unrelated activities, such as highway maintenance — the State might still be able to defend its statute against a constitutional attack by arguing that, what it has denominated to be a "fee," in actuality is a "tax" designed to raise general revenue. In this connection, it may be significant that, according to the terms of N.J.S.A. 2A:34-16, monies collected from divorce petitioners were intended "for the use of the state." *See generally* National Cable Television Ass'n, Inc. v. United States, 415 U.S. 336, 340-41 (1974) (discussing the significant differences between a tax and a fee); California v. Buzard, 382 U.S. 386, 395 (1966) (holding that a State's license "fee" arrangement was in reality a tax "raised to defray the general expenses of government").

In our view, however, just as the Constitution neither demands nor expects perfection on the part of a legislature engaged in adopting laws that classify,[25] so too the Constitution neither demands nor expects omniscient oversight on the part of a legislature once those laws have taken effect. " 'The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.' " *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 n.12 (1980) (quoting *Vance v. Bradley*, *supra*, 440 U.S. at 97). All that is required in either instance — whether at the time of enactment or at the time of oversight — is that the legislature act reasonably.

Based on the record in this appeal, we conclude that the New Jersey Legislature did not act unreasonably under the circumstances described. Specifically, once the Legislature concluded that its original assumption about the relative impact of divorce litigation was no longer applicable, it did exactly what the plaintiffs sought in this lawsuit: it repealed the trial fee statute.[26] Moreover, this entire process of enactment, reassessment, and rescindment occurred within nine years — not an unreasonable period, considering the limited time and resources available to a state legislative body, and the lack of any evidence indicating that the Legislature actually knew well before 1980 that an adjustment in the divorce fee should be considered. There may be a role for the courts to play when a statute, rendered manifestly unreasonable by changed conditions, remains in effect for many years without legislative action.[27] But where, as here, the Legislature has proceeded with promptness, judicial intervention is neither necessary nor appropriate.

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[25] *See* Western & Southern Life Ins. Co. v. State Bd. of Equalization of Cal., 451 U.S. 648, 671-72 (1981) ("whether *in fact* the provision will accomplish its objectives is not the question: the Equal Protection Clause is satisfied if we conclude that the [legislature] *rationally could have believed* that the [law] would promote its objective"); Harris v. McRae, 448 U.S. 297, 326 (1980) ("we cannot, in the name of the Constitution, overturn duly enacted statutes simply 'because they may be unwise, improvident, or out of harmony with a particular school of thought' " (quoting Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955))).

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[26] Plaintiffs — in addition to the district judge, 508 F. Supp. at 838, and the dissent, typescript op. at 11 n.4 — rely heavily on a statement by the Public Safety and Defense Committee which accompanied the Legislature's repeal of the State's supplemental divorce fee. That statement asserts that the original purpose of the matrimonial fee was to fund the special mastership system; it suggests that, with the elimination of that system, the fee constitutes an "anachronism" and perhaps an "unreasonable classification." We do not find the Committee's observations dispositive, one way or the other, of the rationality issue. To begin with, it should be noted that the statement labels the fee arrangement "anachronistic" and "unreasonable," and not "irrational" or "unconstitutional" — a distinction of no small difference, in view of the fact that there are many laws considered by some to be anachronistic or unreasonable that would concededly survive review under the equal protection clause (*see, e.g.*, the statutory rape law, applicable only to males, at issue in Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981)). More to the point, the opinion of the 1980 Legislature as to the original purpose underlying the matrimonial-fee statute is not controlling, inasmuch as " 'the views of a subsequent [legislature] form a hazardous basis for inferring the intent of an earlier one.' " Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 117 (1980) (*quoting* United States v. Price, 361 U.S. 304, 313 (1960)); *see also* Haynes v. United States, 390 U.S. 85, 87 n.4 (1968); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 348–49 (1963). It is even more questionable to infer legislative intent from "[a] mere statement in a conference report . . . as to what [a] Committee believes an earlier statute meant." Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., *supra*, 447 U.S. at 118 n.13 & 119-20; *see also* Oscar Mayer & Co. v. Evans, 441 U.S. 750, 758 (1979). Finally, undue reliance by the courts on legislative statements as to the reasons for or the worth of a previously enacted statute might well inhibit the free exchange of ideas within a legislative body, and indeed could discourage any legislative action whatsoever to correct the problem perceived here — retention of (allegedly) anachronistic laws. After all, it cannot be doubted that the report of

In short, because a rational reason can be identified for the institution and the retention of New Jersey's sup-

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New Jersey's Public Safety and Defense Committee would have been much more circumspect, and that perhaps its recommendation of repeal might have been modified or withheld, had its authors realized that their words would later form an important — perhaps the overriding — basis for a court's declaration as to the unconstitutionality of a previously enacted statute.

[27] In this connection, counsel for the State argues that the district court misapplied equal protection doctrines by focusing on the actual workings of a statute at the time of trial, as opposed to the intended and foreseeable consequences at the time of its enactment. We find it unnecessary to appraise this contention. We note, however, that the Supreme Court appears not to have determined definitively whether changed conditions are a relevant consideration in equal protection analysis. *Compare* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981) ("Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken") *and* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911) ("If any state of facts reasonably can be conceived that would sustain [a statute], the existence of that state of facts *at the time the law was enacted* must be assumed") (emphasis added) *with* G.D. Searle & Co. v. Cohn, 50 U.S.L.W. 4243, 4244 (U.S. Feb. 24, 1982) (Court considers whether a statute "no longer is rationally related to a legitimate state objective," in light of intervening event) *and* United States v. Carolene Prods. Co., 304 U.S. 144, 153 (1938) ("the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist"); *see generally* Bice, *Rationality Analysis in Constitutional Law*, 65 Minn. L. Rev. 1, 33-37 (1980).

plemental divorce fee — namely, the need for reimbursement of a portion of the expenses incurred by the State in providing divorce-related services[28] — we hold that the State has satisfied the rational relation test.[29]

III

Early in the last century, Chief Justice Marshall set forth his now-classic exposition of the appropriate role assigned to the courts in our constitutional scheme when state statutes are challenged. He declared that

> whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. . . . [I]t is not on slight implication and vague conjecture, that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatability with each other.

Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 128 (1810). Because we do not feel such a "clear and strong conviction" regarding the "incompatability" of the New Jersey statute with the United States Constitution, we hold that the State's trial fee was not inconsistent with the requirements of "the equal protection of the laws." Accordingly, the judgment of the district court will be reversed, and the matter will be remanded to that court for further proceedings consistent with this opinion.

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[28] The district court, 508 F. Supp. at 837-38, and the dissent, typescript op. at 11 n.3, discuss and rebut a second justification for the divorce fee proffered by the State: that the fee "encourages reflective thought" on the part of individuals contemplating dissolution of their marriage. We find no reason to evaluate this alternative defense of the statute, however, since we already have identified a legitimate purpose that was served by the challenged classification. " 'The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.' " Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973) (quoting Madden v. Kentucky, 309 U.S. 83, 88 (1940)).

[29] Our analysis and holding with respect to the $50 trial fee apply equally to the $10 assessment for stenographic services collected by the State in contested divorce actions.

SLOVITER, *Circuit Judge*, dissenting.

I would affirm the judgment of the district court that the fees held in escrow by defendant be refunded with interest to the individuals who had deposited them because I believe that the statute pursuant to which they were collected violates the Equal Protection Clause.

The district court concluded that New Jersey's matrimonial fee system neither employed any suspect classification nor impinged on any fundamental right, and therefore it used the rational basis standard in its constitutional analysis. *Murillo v. Bambrick*, 508 F. Supp. 830, 833 (D.N.J. 1981). The district court correctly held that no suspect classification is involved in this case. However, I conclude from the line of Supreme Court precedent holding that the right to marry is fundamental that the correlative right to obtain a divorce is fundamental, that therefore the classification imposed in the statute before us is subject to heightened judicial scrutiny, and that it cannot survive such scrutiny.

In *Boddie v. Connecticut*, 401 U.S. 371 (1971), the Supreme Court held that a Connecticut statute imposing filing and service fees of approximately sixty dollars on civil litigants violated the Due Process Clause when it was applied to indigents seeking to bring an action for divorce. The Court held that because the state had a monopoly of the means for legally dissolving the marriage relationship, it could not deny some of its citizens access to its courts for that purpose by imposing fees which they were unable to pay. Justices Douglas and Brennan would also have held that the Equal Protection Clause precludes conditioning access to the courts upon ability to pay in all manner of cases, not merely divorce actions. The opinion of the Court, however, predicated its holding on "the basic position of the marriage relationship in this society's hierarchy of values." *Id.* at 374. Several times in that opinion, the Court emphasized the fundamental nature of the right at issue. It stated "marriage involves interests of basic importance in our society," *id.* at 376, referred to the "special nature of the *divorce action*", *id.* at 381 n.8, and characterized *divorce* as "the adjustment of a fundamental human relationship." *Id.* at 383 (emphasis added).

The due process problem involved in *Boddie* is not presented by N.J. Stat. Ann. §2A:34-16 which contained an exemption for "actions in forma pauperis". Nonetheless, that case is significant because of the Court's recognition of the right to divorce as fundamental. Two years after *Boddie*, the Court affirmed that the holding in *Boddie* was predicated on the fundamental nature of the right to obtain a divorce. In *United States v. Kras*, 409 U.S. 434 (1973), the Court upheld a provision of the Bankruptcy Act, 11 U.S.C. §32(b)(2), imposing filing fees for actions in bankruptcy against due process and equal protection challenges by indigents. The Court distinguished *Boddie*, stating:

> The denial of access to the judicial forum in *Boddie* touched directly, as has been noted, on the marital relationship and on the associational interests that surround the establishment and dissolution of that relationship. On many occasions we have recognized the fundamental importance of these interests under our Constitution. . . . [In contrast,] [w]e see no fundamental interest that is

> gained or lost depending on the availability of discharge in bankruptcy.
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> . . . .
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> . . . Bankruptcy is hardly akin to free speech or marriage or to those other rights, so many of which are imbedded in the First Amendment, that the Court has come to regard as fundamental and that demand the lofty requirement of a compelling governmental interest before they may be significantly regulated. . . . This being so, the applicable standard . . . is that of rational justification.

409 U.S. at 444-46.

Most recently, in *Zablocki v. Redhail*, 434 U.S. 374 (1978), the Court reiterated that the right to marry (and with it the right to divorce) is fundamental, one of the "personal decisions protected by the right of privacy." *Id.* at 384. At issue in that case was a Wisconsin statute which provided that any resident who had a judicially imposed support obligation for minor children not in his or her custody could not marry, within the state or elsewhere, without first obtaining court permission to marry. The Court emphasized that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men," *id.* at 383 (quoting *Loving v. Virginia*, 388 U.S. 1, 12 (1967)), and reaffirmed that the fundamental nature of the right to marry applied equally to the right to obtain a divorce. *Id.* at 385 n.10. The Court held that because "the right to marry is of fundamental importance" and the classification significantly interfered with the exercise of that right, it was necessary to undertake a "critical examination" of the state interests advanced in support of the classification. The Court held that the statutory classification could not be justified by the interests advanced in support of it, and therefore violated the Equal Protection Clause. *Id.* at 383, 390-91.

In light of this line of precedent, the reluctance of the majority to recognize the existence of a fundamental right to divorce is inexplicable. It is even more perplexing because the majority concedes the proposition that the right to marry is fundamental. It gives no cogent reason for differentiating between the right to marry and the right to divorce. See Majority Typescript op. at 9 n.9. Both logic and practicality require that marriage and divorce be considered correlative. *See Developments in the Law: The Constitution and the Family*, 93 Harv. L. Rev. 1156, 1311 (1980). In no state in this country can one marry if a previous marriage to someone still living has not been dissolved by divorce or annulment. Presumably the majority would agree that the right to marry is not limited to the right to marry only once. Furthermore, even married persons who do not wish to remarry have a fundamental right to resume singlehood.

Because the right to marry inheres in the right to privacy, and the Court has recognized that "it would make little sense" to recognize a right of privacy with respect to some but not all matters of family life, *see Zablocki v. Redhail*, 434 U.S. at 386, it follows that the same considerations apply to the right to dissolve the marriage relationship. The Court expressly intertwined those rights in *United States v. Kras*, 409 U.S. at 444, when it referred to the "associational interests that surround the establishment and dissolution of the [marital] relationship" and the "fundamental importance of these interests under our Constitution." Therefore, I believe we must start our analysis of the statutory classification with the principle that we are dealing with a fundamental right, the right to divorce.

Zablocki teaches not only that the right to marry and divorce are to be considered as fundamental rights for purposes of equal protection analysis, but also that a heightened scrutiny is appropriate even when the statutory classification does not absolutely prevent either marriage or divorce. The Court noted that there were "[m]any [persons], able in theory to satisfy the statute's requirements, [who] will be sufficiently burdened by having to do so that they will in effect be coerced into forgoing their right to marry." 434 U.S. at 387. The inquiry made by the Court was whether the statutory classification "directly and substantially" interfered with the right to marry. *Id.* This is consistent with the approach taken by the Court in considering the burden of justification to be met by statutory classifications affecting other fundamental rights.

In *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972), the Court invoked strict scrutiny in invalidating a durational residency requirement for voting which directly impinged on two fundamental rights, the right to vote and the right to interstate travel. In explaining its use of that standard even though the Tennessee statute did not completely deny the right to travel, the Court stated:

> Of course, it is true that the two individual interests affected by Tennessee's durational residence requirements are affected in different ways. Travel is permitted, but only at a price; voting is prohibited. The right to travel is merely penalized, while the right to vote is absolutely denied. But these differences are irrelevant for present purposes. *Shapiro [v. Thompson*, 394 U.S. 618 (1969)] implicitly realized what this Court has made explicit elsewhere:
>
> > "It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution. . . ."

Id. at 341 (citation omitted). *See* L. Tribe, *American Constitutional Law* 1005 n.18 (1978). This approach is equally applicable to burdens on the right of marriage and divorce, for, as the Court stated in *Zablocki*, "[E]ven those who can be persuaded to meet the statute's requirements suffer a serious intrusion into their freedom of choice in an area in which we have held such freedom to be fundamental." 434 U.S. at 387 (footnote omitted).

Of course, not every classification which may affect the marital relationship in any way warrants strict scrutiny. For example, in *Califano v. Jobst*, 434 U.S. 47 (1977), the Court had applied the rational basis test in rejecting an equal protection challenge to a provision of the Social Security Act terminating, under certain circumstances, a dependent child's Social Security benefits when the child married. The Court subsequently characterized *Califano v. Jobst* as a case involving "legislation providing governmental payments of monetary benefits that has an incidental effect on a protected liberty." *Califano v. Aznavorian*, 439 U.S. 170, 177 (1978). In the *Zablocki* opinion which was decided the same term and only shortly after *Califano v. Jobst*, the Court stated "[b]y reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny." 434 U.S. at 386. The *Zablocki* majority distinguished *Zablocki* from the earlier *Califano v. Jobst* case on the basis of the "directness and substantiality of the interference with the freedom to marry." 434 U.S. at 387 n.12.

The majority in this case adroitly sidesteps deciding whether the New Jersey statute trenched upon a fundamental interest by concluding the statute "did not 'significantly' or 'directly or substantially' infringe upon the right of individuals to obtain dissolutions of their marriages." Majority Typescript op. at 10. The majority reaches its conclusion in the face of the contrary findings of the district court. That court found that although Murillo did not qualify as an indigent, at the time that she initiated these proceedings she was working as a domestic and earning $25.00 to $28.00 per day. The district court concluded that "[t]he State of New Jersey had thus placed plaintiff in a dilemma: either she would have had to pay what was to her a substantial sum to sue for divorce; or she would have remained hostage to a marriage which under the substantive law of the State she was entitled to have dissolved." 503 F. Supp. at 832. Even if the majority can formulate some basis to reject these findings, which indicate more than a mere incidental effect on the exercise of the right to obtain a divorce, it provides no record basis to support its own contrary conclusion. *See Pullman-Standard v. Swint*, 50 U.S.L.W. 4425, 4429-30 (U.S. April 27, 1982). Essentially all the majority relies upon is the principle, patently unassailable, that the state has the right to collect a portion of its expenses from those persons who seek a divorce. It appears to me the majority has intermingled two analytically distinct issues: whether there is a sufficient impact or burden imposed by the classification to warrant use of the strict scrutiny standard in the first place, and whether the classification survives the application of that level of scrutiny. In analyzing whether there is a sufficiently substantial burden to warrant use of the strict scrutiny standard, I would look both to the district court's findings and the undisputed fact that the matrimonial fee penalized each New Jersey resident (with the exception of indigents) who sought to exercise his or her right to obtain a divorce. These evince a sufficiently direct and sweeping burden on a fundamental right to subject the classification to heightened judicial scrutiny. The majority's statement that the "hardship" on individuals such as Murillo "although unfortunate, falls short of establishing that such persons have been *precluded* from obtaining divorces", Majority Typescript op. at 12 (emphasis added), overlooks the Supreme Court precedent discussed *supra* at pp. 5-6 where the Court stated that total preclusion is not a prerequisite to invocation of strict scrutiny.

Turning then to the question whether the classification can withstand such heightened scrutiny, it is necessary to consider whether the statutory classification "is supported by sufficiently important state interests and is closely tailored to effectuate only those interests. *See, e.g., Carey v. Population Services International*, 431 U.S., at 686; *Memorial Hospital v. Maricopa County*, 415 U.S., at 262-263; *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S., at 16-17; *Bullock v. Carter*, 405 U.S. 134, 144 (1972)." *Zablocki v. Redhail*, 434 U.S. at 388. Burdens which operate directly upon fundamental rights, including the right to marry or to obtain a divorce, are not necessarily constitutionally infirm. "[A] state may legitimately say that no one can marry his or her sibling, that no one can marry who is not at least 14 years old, that no one can marry without first passing an examination for venereal disease, or that no one can marry who has a living husband or wife." *Zablocki v. Redhail*, 434 U.S. at 392 (Stewart, J., concurring). The legitimate and justifiable objectives served by such statutory requirements are evident.

In *Sosna v. Iowa*, 419 U.S. 393 (1975), the Court upheld an Iowa one-year durational residency requirement for persons seeking a divorce. Without indicating which standard of review it was employing, the Court focused on "the state interest in requiring that those who seek a divorce from its courts be genuinely attached to the State, as well as a desire to insulate divorce decrees from the likelihood of collateral attack." *Id.* at 409. The Court found that because the Constitution permits other states to disregard a finding of domicile entered in an *ex parte* proceeding in the face of "cogent evidence" to the contrary, it was "quite permissible" for Iowa to infer that the one-year residency requirement "provides a greater safeguard against successful collateral attack than would a requirement of bona fide residence alone." *Id.* at 408 (footnote omitted).[1] It is noteworthy that in *Sosna* the Court stated that once the one-year period expired, Sosna "could ultimately have obtained the same opportunity for adjudication which she asserts ought to have been hers at an earlier point in time." *Id.* at 406. In contrast, the New Jersey special matrimonial fee imposed a permanent burden which would not automatically be removed by the passage of time.

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[1] The majority suggests that *Sosna* may be read as support for the proposition that divorce does not implicate any fundamental right. Majority Typescript op. at 9 n.9. *Sosna*, however, never ad-

In this case the State has not always posited the legislative objective behind the special matrimonial fee with either clarity or consistency. New Jersey originally sought to justify the fee on the basis of the following factors listed in its Answers to Interrogatories:

> A. Judge's time spent on matrimonial cases, including the fact that all matrimonial cases require bench time.
>
> B. Additional time spent by the Clerk of the Superior Court's office including verification of an Answer, verification to see if default properly entered, and verification of the service upon the defendant.
>
> C. Additional post-judgment time spent on matrimonial vs. other cases.
>
> D. Trial fee encourages reflective thought.

According to the State itself, at trial "the first three contentions were withdrawn" but "the fourth was maintained in a somewhat modified form, with the State arguing that the additional fees would serve the State public policy of not encouraging divorces." Brief on Behalf of Defendant-Appellant at 7-8. On appeal the State shifted its position and, at least as now reformulated by the majority, the rationale posited for the special matrimonial fee is that "it would not have been unreasonable

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dressed the issue. Any inference to be drawn from *Sosna* respecting the right to divorce would seem to apply equally to the right to interstate travel, also at issue in that case, which the Supreme Court has repeatedly held to be fundamental.

for the Legislature to have been of the opinion that the State's divorce system made financial as well as non-financial demands upon the judiciary, thereby justifying additional monetary support from the users of that system". Majority Typescript op. at 16.[2] This appears to be in substance the rationale which the State expressly abandoned in the trial court.[3] It is also at variance with the purpose ascribed to the special matrimonial fee by the New Jersey Legislature when it repealed that fee.[4]

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[2] The State's suggestion that because this is an equal protection case, the trial court must consider any conceivable rationale, whether or not it was raised, and that we in turn have an obligation to consider the State's contentions, whether or not raised below, is at variance with our oft-stated view that we will ordinarily not consider issues on appeal that were not presented to the trial court. *See, e.g.*, Newark Morning Ledger Co. v. United States, 539 F.2d 929, 932-33 (3d Cir. 1976).

[3] The majority does not reach the State's contention that the matrimonial fee "encourages reflective thought" and thereby serves the State's interest in "not encouraging divorce". The trial court found that since the enactment of no-fault divorce in 1971, the purpose to discourage divorces has not existed. Subsequent statutory enactments may show abandonment of a prior legislative purpose. Eisenstadt v. Baird, 405 U.S. 438, 448 (1972). In any event, the State offered no basis for finding any connection between the special matrimonial fee and encouraging reflective thought before divorce. The numerous waiting periods already contained in New Jersey's substantive law of divorce, N.J. Stat. Ann. §2A:34-2, provide an effective and more closely tailored means for the state to insure that its citizens do not hastily and unreflectingly seek a divorce.

[4] According to the legislative statement which accompanied the repealer of the fee,

> These proposed amendments to the New Jersey court fee system would serve two purposes. First, they would eliminate the approval fee required in matrimonial cases before the Superior Court — currently, these fees are $50.00 in uncontested cases and $60.00 in contested cases. Secondly, this legislation would increase the general fee for the filing of all civil complaints from $60.00 to $75.00.
>
> In the past, the *$50.00 or $60.00 differential required for matrimonial cases was justified by an additional review provided in such cases by a standing master who determined*

The district court summarized the State's contention as "that the matrimonial fees provided a means of supporting the additional court costs required to give divorce cases the high degree of scrutiny required under New Jersey law." 508 F. Supp at 835-36. In considering this argument, notwithstanding its withdrawal by the State, the district court found:

> Although a minority of actions, filed on the basis of fault, may still require special judicial scrutiny, most matrimonial litigants require no extraordinary judicial supervision. Indeed, it was demonstrated at trial that *the average cost of disposing of a matrimonial case was significantly less than the average cost of adjudicating other civil actions.*

508 F. Supp. at 836 (emphasis in original; footnote omitted). The State does not dispute this factual finding.

As I understand the State's contention on appeal, it is that it is irrelevant whether in fact matrimonial cases "require additional monies to operate in conformity with state law" because under the rational basis standard it is sufficient if the legislature may have reasonably, albeit erroneously, thought they did or predicted they would.

> *whether or not the matter was fit for trial.* Today, no similar review exists to justify any such differential in fees. As a result, these approval fees for matrimonial cases have been questioned as an unreasonable classification in an action pending before the Federal district court. The elimination of these fees would thus serve to eliminate an anachronism from the court's fee structure.
>
> The simultaneous increase in the general filing fee for all civil complaints, from $60.00 to $75.00, is a necessary increase in court revenues to adjust for the elimination of the matrimonial fees and to compensate for inflationary pressures.

1980 N.J. Sess. Law Serv., ch. 80, at 271 (emphasis added). I see no reason why the majority's hypothetical rationale for the special matrimonial fee should be preferred over that given by the legislature itself.

The majority appears to have accepted this position. I need not comment on whether the majority has appropriately applied the rational basis standard, because I believe it is evident that the statutory classification cannot stand under the heightened scrutiny which I would apply. If the statute is not "closely tailored to effectuate only [the important state] interests," then it cannot be sustained. The matrimonial fees cannot be necessary or "closely tailored" to defray the higher costs of divorce actions when, as a factual matter, those higher costs do not exist. Moreover, there is some question whether burdens on fundamental rights can be defended on financial grounds alone. *See Shapiro v. Thompson*, 394 U.S. at 633. *See also Sosna v. Iowa*, 419 U.S. at 406 ("Iowa's residency requirement may reasonably be justified on grounds *other than* purely budgetary considerations or administrative convenience") (emphasis added).

The majority, in attempting to support its position that the special divorce fee does not "significantly" or "directly or substantially" infringe upon the right to divorce, has made arguments which appear to be directed to whether that fee, even if it imposes a burden, can be justified. Thus, for example, the majority mischaracterizes the challenge to the fee as, in effect, a claim that the State must provide a "free divorce." Murillo does not claim that she is entitled to a *free* divorce, but only that her exercise of her right to a divorce should not be penalized by imposing upon her a fee higher than that for other litigants. She is not making a due process challenge but an equal protection challenge, concepts which the majority has confused. Therefore, the majority's suggestion that Murillo's challenge could also be leveled at "the seventy-five dollar *filing* fee currently required of all litigants", Majority Typescript op. at 12, misconceives the nature of the constitutional challenge. The equal protection attack on the matrimonial fee is premised on the fact that litigants seeking a divorce were singled out for discriminatory treatment because they were the *only* litigants required to pay a *special fee*. It is completely beside the point that the State uses the filing fee to seek to defray some of the costs of terminating the marital relationship. Presumably that is the basis on which the State charges a filing fee to any litigant. The State produced no evidence that there was any basis to charge a matrimonial litigant a *higher* fee; it ultimately abandoned the argument that there was any empirical basis for such a higher fee, and in fact it is currently charging all litigants the same general filing fee, which it increased from $60 to $75 in 1981 "to adjust for the elimination of the matrimonial fees and to compensate for inflationary pressures." See note 4 *supra*.

Because a fee for filing divorce actions directly affected the exercise of a fundamental interest, the statute must withstand heightened scrutiny, not the inadequate level of scrutiny used by the majority. Using what I believe is the correct level of scrutiny, the classification must fall.[5]

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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[5] I cannot avoid noting that the district court has indicated that it would have originally granted an injunction to enjoin collection of the fee had it decided the case when it was first presented because it believed the matrimonial fee was unconstitutional. Transcript of Sept. 10, 1980, at 111. Had it done so, the fund at issue in this case would not have accumulated. It came into being only because the district court stayed proceedings in order to give the New Jersey Legislature an opportunity to resolve the matter of the matrimonial fee. The district court noted its unhappiness with the action of the New Jersey Legislature which made its abolition of the matrimonial fee prospective only and made no provision for the return of the already collected fees held in escrow pursuant to the district court order. *Id.* at 111-12. Since this fund was created only because of the delay of action by the New Jersey Legislature, it is ironic that it should be permitted by this decision to profit by that very delay.

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 79-2345

DONNA M. MURILLO

vs.

W. LEWIS BAMBRICK, Clerk of the
Superior Court of New Jersey,

Defendant.

Newark, New Jersey

February 20, 1980

FEBRUARY 20, 1980 OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

APPEARANCES:

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STERN, District Judge

Plaintiff Donna Murillo, on behalf of herself and all others similarly situated, brings this action pursuant to 42 U.S.C. §1983 challenging the constitutionality of a New Jersey law which required matrimonial litigants, and only matrimonial litigants, to pay a fifty- or sixty-dollar trial fee in addition to the filing fee required of all civil litigants. Plaintiff seeks a declaration that these laws, which were abolished by the New Jersey state legislature during the pendency of this suit, violated the equal protection clause of the Fourteenth Amendment. In addition, plaintiff requests a refund of all matrimonial trial fees collected from class members, but held in escrow by order of the Court, from the inception of the lawsuit until the demise of the challenged legislation on September 1, 1980.

I. Facts and Procedural History

On June 18, 1979, plaintiff Donna Murillo commenced a divorce against her husband in the New Jersey Superior Court. She paid a sixty-dollar filing fee, the same fee required for all actions brought in the Superior Court, and her husband was served with a summons and complaint. When he did not appear to contest the action, plaintiff sought the entry of a default judgment. In most actions -- indeed, in any state court action in New Jersey except a matrimonial action -- Mrs. Murillo's case would have been ready for trial and she could have obtained a default judgment without delay. Because her action was for divorce, however, she could not obtain a default judgment until she paid an additional fee, a so-called "trial fee", of fifty dollars. This fee applied even though the matter was uncontested. Had Mrs. Murillo paid this fee, and had her husband later contested the divorce, plaintiff would have been required to pay an additional "stenographer's fee" of ten dollars before the matter could be tried. Like the trial fee, the stenographer's fee was imposed only on matrimonial litigants.[1]

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[1] These fees were set forth in both a statute and a court rule. N.J. Stat. Ann. §2A:34-16 provided:

> Except in actions in forma pauperis, before any matrimonial action is approved for trial the plaintiff or counterclaimant shall pay to the clerk of the superior court, for the use of the state, the sum of $50 and in litigated actions the additional sum of $10.

New Jersey Court Rule 4:79-2 provided:

> Except as otherwise provided by R. 1:13-2 [actions by indigents], before any matrimonial action is approved for trial the plaintiff or counterclaimant shall deposit with the clerk the sum of $50 and in litigated actions the additional sum of $10 for stenographic fee. The aforesaid fees together with the request for approval for trial of the matrimonial action shall be forwarded to the clerk within 30 days of the entry of default or the service of a pleading contesting the action.

If Mrs. Murillo had been an indigent, she could have applied to have all fees waived. N.J. Court Rules 1:13-2(a), 4:79-2. At the time she instituted the proceedings, however, she earned twenty-five to twenty-eight dollars per day as a domestic, and did not qualify as an indigent. The State of New Jersey had thus placed plaintiff in a dilemma: either she would have had to pay what was to her a substantial sum to sue for divorce; or she would have remained hostage to a marriage which under the substantive law of the State she was entitled to have dissolved.

Mrs. Murillo filed suit in August 1979 in federal court seeking a declaration that the state statutes under which additional trial fees were collected only from matrimonial litigants, N.J. Stat. Ann. §2A:34-16 and N.J. Court Rule 4:79-2, violated the equal protection clause of the Fourteenth Amendment. On September 26, 1979, at an initial hearing on plaintiff's application for a temporary restraining order, we found that Mrs. Murillo had demonstrated immediate and irreparable harm[2/] and the likelihood of success on the merits. The Court, pursuant to Rule 23, Fed. R.Civ.P., provisionally certified a class consisting of all matrimonial litigants in the State of New Jersey who had not yet paid their trial or stenographic fees and entered a temporary restraining order. The order required defendant W. Lewis Bambrick, Clerk of the Superior Court of New Jersey, to deposit all fees collected pursuant to N.J. Stat. Ann. §2A:34-16 and N.J. Court Rule 4:79-2 in an interest-bearing bank account rather than transfer the funds to the general state treasury, as was the usual procedure.

[2/] Had Mrs. Murillo paid the fee to the State and later prevailed in her constitutional challenge to the statute, the Eleventh Amendment would bar recovery of the money which she would have expended. See Edelman v. Jordan, 415 U.S. 651, 663-65 (1974).

During hearings conducted in late September and early October 1979, it came to the Court's attention that the provisions under attack by Mrs. Murillo were also the subject of review by the New Jersey Supreme Court and the state legislature. At the suggestion of the State, and with plaintiff's consent, the Court stayed this action to permit the State to resolve this matter, if possible, by legislative action. The stay would afford the New Jersey Supreme Court a reasonable time to evaluate the fee structure of the court system, to make whatever recommendations it deemed appropriate to the Governor and legislature, and would permit the legislature a reasonable time to act on the Supreme Court's recommendations. The parties agreed to continue the restraints in the interim: all matrimonial fees would be collected from litigants seeking divorces and deposited in the interest-bearing escrow account created by order of the Court. None of these actions would prejudice the rights of the parties to the fund.

In the summer of 1980 the anticipated reforms finally came to pass. The state legislature abolished the special trial and stenographer's fees exacted from matrimonial litigants and created a uniform system for all categories of civil litigation.[3/] The legislation was made effective September 1, 1980, but matrimonial litigants were afforded only prospective relief. Thus, the rights of Mrs. Murillo and her fellow class members were still at issue. From September 27, 1979, through September 1, 1980, all of the fees generated under the former system had been collecting in the escrow account, a sum now

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[3/] In the same act that abolished the special matrimonial trial fees, the legislature raised the standard filing fee required of all litigants in the Superior Court from sixty dollars to seventy-five dollars. See N.J. Stat. Ann. §§22A:2-6, 22A:2-12 and 22A:2-15.

estimated at $1.3 million. Although the state legislature had abolished the dual fee system for all future litigants, defendant Bambrick maintained that the State was entitled to keep the funds it had already collected and held in escrow. Despite the Court's efforts to accommodate the State's request for an opportunity to resolve this matter on its own, we were required to conduct a trial and reach a determination on the merits of plaintiff's constitutional claim. The trial took place on September 9 and 10, 1980. At its conclusion, we found that the New Jersey scheme under which matrimonial litigants were required to pay special trial and stenographic fees was not a rational means to further any articulated state interest, and held that the scheme violated the equal protection clause of the Fourteenth Amendment. Accordingly, we ruled that plaintiffs were entitled to a refund of the monies paid into the escrow account with interest. This opinion is intended to explain and supplement that decision.

II. Standard of Review

The Supreme Court has established two standards for evaluating whether legislation satisfies the equal protection clause. If the challenged classification operates to the disadvantage of a suspect class or impinges upon a fundamental right under the Constitution, the statute will be invalidated unless the state can demonstrate a compelling interest in making the classification. This is a very heavy burden, and the determination that a statute creates a suspect classification or impinges on a fundamental interest has usually been fatal. Thus far, the Supreme Court has limited suspect classifications to race, national origin, and alienage, and fundamental interests have been limited to the right to vote, the right to interstate travel, the right to appeal in criminal cases, and the right of access to the courts in certain civil cases.[4]

If, as in this case, no suspect class or fundamental interest is present, the statute must still pass the "rational basis" test -- that is, the classification must rationally further "some legitimate, articulated state purpose." *San Antonio Independent School District v. Rodriguez*, 411 U. S. 1, 17 1973).[5] The rational basis test has traditionally been highly deferential. As the Court stated in Dandridge v. Williams, 397 U.S. 471, 485 (1970):

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[4] Plaintiffs do not contend that their "right of access" to the state courts to obtain a divorce has been violated by the statutes in question. *See Boddie v. Connecticut*, 401 U.S. 371 (1971). *The constitutional right* of access is satisfied by provisions requiring waiver of the fee for indigents. N.J. Court Rules 1:13-2(a); 4:79-2.

[5] In addition, the Supreme Court has in some cases appeared to treat sex in a category in between suspect classifications and other classifications requiring application of the rational basis test. *See Reed v. Reed*, 404 U.S. 71 (1971). It is clear that "matrimonial litigants" are not a suspect class and that the intermediate standard which has apparently been applied in sex discrimination cases should not be extended to other classifications.

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78. "The problems of government are practical ones and may justify, if they do not require, rough accommodations -- illogical, it may be, and unscientific." Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 426.

On the other hand, the Court has made clear that it will no longer uphold a statute on any basis that the state happens to put forth. The state must establish that its legislation is intended to further a "legitimate, articulated state purpose." Weinberger v.

Wiesenfeld, 420 U.S. 636, 648 (1975). The mere recitation by the state of a benign purpose in discriminatory legislation "is not an automatic shield which protects against inquiry into the actual purposes underlying a statutory scheme." Id. The Court in that case observed that "[the] Court need not in equal protection cases accept at face value assertions of legislative purposes when an examination of the legislative scheme and its history demonstrate that the asserted purpose could not have been a goal of the legislation." Id. at 648 n.16. See also Minnesota v. Clover Leaf Creamery Co., 49 U.S.L.W. 4111, 4113 n.7 (January 21, 1981).

III. The Fifty-dollar "Trial Fee"

A. Background

To determine whether the challenged provisions rationally serve a legitimate, articulated state interest it is important to understand the evolution of the substantive and procedural law of divorce in New Jersey.

Until recently, New Jersey recognized only three grounds for divorce: adultery, desertion, and extreme cruelty. N.J. Rev. Stat. §2A:34-2 (1952). The State considered divorce a remedy reserved only for the most unusual circumstances, not merely for every situation in which both parties agreed they wanted to dissolve their marriage.

In accordance with the State's determination to scrutinize all divorce cases carefully, a system developed as early as the turn of the century whereby special masters were appointed to review each divorce case before it went to trial. These special or advisory masters screened every file and reported to the chancellors, who ultimately heard only non consensual, non-fraudulent matrimonial cases. Originally, the advisory masters were compensated pursuant to rules promulgated by the Chancery Court. For example, under Rule 266, Revised Chancery Rules (1928), matrimonial litigants seeking a hearing before an advisory master and a subsequent trial were required to deposit fifty dollars with the clerk of the court. Since the State had an interest in preventing divorces on grounds other than those explicitly permitted, it considered itself a party, albeit not in name, to every suit for divorce. The State was omnipresent, standing over the shoulders of the litigants -- in the body of the advisory master -- to prevent collusive divorces.

Although the State eventually phased out the office of advisory master, it still intended the judicial system to exercise particularly careful oversight of divorce suits. In 1948, the legislature created the system of matrimonial trial fees at issue in this case. No legislative history of the act exists, but testimony introduced at trial indicates that the legislature intended that, as the system of advisory masters was abolished, the existing judicial structure would be required to perform tasks previously executed by the masters. The fee system created by the newly-enacted statute would institutionalize financial support for a category of cases requiring closer judicial scrutiny and a greater allocation of court resources. Although the exact purpose of the legislature in 1948 is now enshrouded in the mists of time, the fees fixed by the statute were the same as those formerly awarded to the masters by court rule. Thus, the 1948 statute represented a change only in procedure, not in substantive state policy.

In 1971, New Jersey's substantive law of divorce underwent a dramatic change. The state legislature, for the first time, adopted a provision which permitted divorces on consent of the parties. The Divorce Act was amended, effective September 13, 1971, to permit as grounds for divorce:

> Separation, provided that the husband and wife have lived separate and apart in different habitations for a period of at least 18 or more consecutive months and there is no reasonable prospect of reconciliation. Provided,

> further, that after the 18-month period there shall be a presumption that there is no reasonable prospect for reconciliation.

N.J. Stat. Ann §2A:34-2(d). Whereas the State had previously sought scrupulously to prevent the consummation of collusive divorces, it now provided that a divorce would be granted solely on a showing that a husband and wife had lived separate and apart, either voluntarily or involuntarily, for 18 months.

The purpose of this "no-fault" divorce provision was evinced by the New Jersey Divorce Study Commission which recommended the passage of the legislation:

> In such cases the parties should not be required to resort to the hypocrisy of accusing one or the other of a marital wrong recognized by our present statutes, or the remedy of migratory divorce, which may in any event be beyond their financial resources. Similarly, the Commission is equally convinced that where both parties are guilty of offenses against one another, mutuality of fault should not be a bar to divorce. This can be viewed only as the

> infliction of punishment by the State. It cannot be justified.

Final Report to the Governor and the Legislature of the Divorce Law Study Commission, 6 (May 11, 1970). More succintly, the Superior Court announced shortly thereafter that the rationale of the recent amendments to the Divorce Act (L. 1971, 212) was "to terminate dead marriages regardless of fault or lack of fault." Quinn v. Quinn, 118 N.J. Super. 413, 414, 288 A.2d 51, 52 (Ch. Div. 1972). See also Painter v. Painter, 65 N.J. 196, 205, 320 A.2d 484, 489 (1974); Babushik v. Babushik, 157 N.J. Super. 128, 130, 384 A.2d 574, 575 (Ch. Div. 1978) ("The public policy of New Jersey is to terminate dead marriages"). While the no-fault provision did not represent an abdication of any interest the State had in overseeing the divorce process, see Manion v. Manion, 143 N.J. Super. 499, 502, 363 A.2d 921, 923 (Ch. Div. 1976), it clearly represented a much more liberal conception of divorce than had theretofore existed.

B. State Interests Involved

Defendant, represented by the Attorney General of the State of New Jersey, has contended that the vestigial statutes imposing higher fees on matrimonial litigants remained, at the time this suit was filed, a rational means to further two objectives. First, and it seemed at the time foremost, defendant argued that the additional fees helped pay for the additional court resources required for matrimonial cases.[6/] Second, defendant contended that the statutes served the State's legitimate interest in "not encouraging" divorces.[7/]

[6/] On the second day of trial, as will be explained more fully later, defendant abandoned this agrument. See page 12 infra.

[7/] Defendant contended throughout the proceedings in this case that a meaningful distinction could be made between "not encouraging" and "discouraging" divorces and relied solely on the former as a rational basis. As explained, see note 12 infra,the Court rejects this distinction.

While it cannot be disputed that a state may have a legitimate interest in regulating domestic relations, Sosna v. Iowa, 419 U.S. 393, 404 (1975), and in financing its court system, Manes v. Goldin, 400 F.Supp. 23, 30-31 (E.D.N.Y. 1975), aff'd, 423 U.S. 1068 (1976), plaintiff contends that by the time this suit was commenced, the extra charges placed on matrimonial litigants could no longer be justified on either of these bases.

1. Added Costs

We turn first to the argument defendant relied on principally throughout the proceedings until the second day of trial. Defendant contended that the matrimonial fees provided a means of supporting the additional court costs required to give divorce cases the high degree of scrutiny required under New Jersey law. In support of its contention, defendant pointed to the following characteristics of matrimonial litigation: (1) matrimonial judges review each file to see that service of process has been properly made before trial approval is granted; (2) seven judges in New Jersey have been assigned exclusively to matrimonial matters and eleven others are temporarily assigned to matrimonial matters in addition to other duties; (3) judges from the Superior Court, Law Division, must sometimes be assigned to hear uncontested matrimonial matters on a part-time basis; (4) the clerk's office examines each file in matrimonial cases to determine if there has been a responsive pleading filed and to determine whether a default has been properly entered; (5) the clerk's office employs four persons full-time to send out approval notices; (6) the court rules require a hearing with the plaintiff present in every matrimonial action, even in those cases which are uncontested; and (7) in child custody matters, the judge often requests a report from the county probation department or the state Bureau of Child Welfare on the family living conditions. In addition, defendant argued that the State is a third party, albeit unnamed, in every matrimonial litigation. This, too, ostensibly results in added expenses, although most likely, if at all, to the executive branch rather than the court system. These features of the matrimonial litigation system, defendant contended, required the imposition of fees which amounted between September 1979 and September 1980 to approximately $1.3 million.

The Court finds that the matrimonial litigation system in New Jersey is not a particularly autonomous process and does not require additional monies to operate in conformity with state law. The process by which a case is reviewed to ensure that a complaint and answer have been properly filed and that service was proper is purely ministerial, and could not occupy a significant portion of the time of even the clerk's office relative to other types of cases. The fact that certain judges are assigned exclusively or in part to matrimonial matters in no way indicates that more total judicial time is spent on these matters.

It is clear that the additional fee was intended not to finance the additional clerical time spent on matrimonial cases, but the extra time which a judge was formerly required to spend on such cases. The trial fee had its genesis in the fifty-dollar fee paid to the omnipresent advisory masters. In 1948, when judges assumed the duties formerly carried out by the masters, the fee was retained to cover the new burden on the judicial system. If it were true that prior to New Jersey's institution of no-fault divorce, matrimonial cases took up more of a judge's time than other types of cases, it is readily apparent that this is no longer the case. The no-fault divorce statute provides that there shall be a presumption of irreconcilable differences if the parties to a marriage are separated for at least eighteen months; in practice the mere passage of time is sufficient to obtain a divorce. The majority of all divorce cases are now uncontested,[8/] and plaintiffs in such cases are rarely before the judge for more than a few moments.[9/] Although a minority of actions, filed on the basis of fault, may still require special judicial scrutiny, most matrimonial litigants require no extraordinary judicial supervision. Indeed, it was demonstrated at trial that the average cost of disposing of a matrimonial case was significantly less than the average cost of adjudicating other civil actions.[10/] As defendant admitted on the second day of trial, the State's belief that it was collect-

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[8/] Approximately 60% of all divorce matters are uncontested. Plaintiff's Trial Exh. P-1.

[9/] Transcript of 9/9/80, at 31-33.

[10/] The estimated ratio of revenue to expense for matrimonial cases is 52.9% compared with 29.8% for general civil law and general equity cases. See Defendant's Trial Exh. D-1.

ing these fees to defray the higher cost of providing judicial services to matrimonial litigants was false. In fact, following plaintiff's submission of proof, defendant withdrew its first suggested rational basis.[11/]

2. Not Encouraging Divorces

As a legal matter, then, the State was left with one legal leg on which to stand. It still claimed that it could collect higher fees from matrimonial litigants as a rational means of furthering a state policy of "not encouraging" that particular

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[11/] We observe, however, that even had defendant successfully demonstrated that matrimonial cases required a greater expenditure of court resources than typical civil cases, defendant failed adequately to explain why matrimonial litigants alone had been singled out from among the many groups of litigants in other cases routinely requiring extra judicial supervision. Class actions, actions involving minors and incompetents, probate and adoption matters, to mention but a few, all require independent judicial scrutiny. In none of them, whether contested or not, are the litigants required to post the additional fees required of matrimonial litigants.

kind of litigation.[12] Defendant contends that

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[12] We place the words "not encouraging" in quotation marks because a significant amount of time was spent at oral argument divining the elusive distinction between the words "discouraging" and "not encouraging" in the context of this lawsuit. Counsel for defendant refused to admit that the state policy underlying the matrimonial fee system was to discourage divorce actions, preferring to portray state policy as one of "not encouraging" such cases. For example, the following colloquy took place between the Court and counsel:

> THE COURT: Do you take the position that you can charge more simply to discourage that kind of litigation?
>
> MR. SIMAN: We take the position that the State can make a value judgment, that they don't want to encourage divorce....
>
> THE COURT: Do you take the position that you can charge more to discourage that kind of litigation?
>
> MR. SIMAN: I'll use the words of the cases. We can in fact charge more; by doing that, notencourage divorces.

Transcript of 9/10/80 at 69.

Whatever the linquistic or metaphysical distinctions between discouraging an act and not encouraging an act, this Court is convinced that any distinction between the two concepts in the context of this lawsuit, is illusory. The effect on matrimonial litigants, like Mrs. Murillo, is the same, as witness this earlier exchange in oral argument:

> THE COURT: Tell me what is the rational relationship that requires if A sues B it

the State has had a longstanding policy of "not encouraging" divorces, and that this policy continued at least through September 1980.

Solely because the defendant in this case is an officer of the State of New Jersey,

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12 continued - costs $60 unless A is Mr. or Mrs. B.

> MR. SIMAN: The rational relationship is the State's interest in the matrimonial relationship.
>
> THE COURT: You mean they want to discourage such lawsuits?
>
> MR. SIMAN: I don't know if that's the policy ground for discouraging these things. I think they want to — this is a solemn relationship that has been entered into.
>
> THE COURT: It becomes more solemn when it is more money?
>
> MR. SIMAN: No. I wouldn't — I wouldn't say that. But I think they want to — well perhaps, they want to make litigants think twice or think carefully before they proceed like this....
>
> Perhaps, I think, wouldn't seek it lightly is a better characterization.

Transcript of 9/17/79 at 5-6.

represented by the Attorney General of New Jersey, does not mean that the Court is bound to accept his every contention as to the articulated purposes of the State. Although defendant may be cloaked in the mantle of the State of New Jersey when he appears before this Court, he does so with the same burdens and responsibilities as any other litigant. Defendant's avowals of New Jersey state policy are not sacrosanct. This Court is empowered -- indeed, it is required -- to pierce the surface of defendant's assertions and to examine the actual purposes underlying the statute in question. Weinberger v. Weisenfeld, supra, 420 U.S. at 648.

An examination of the legislative scheme, including the history of its enactment and demise, indicates clearly that at least since passage of the no-fault divorce law, the purpose of the matrimonial fee system has not been to discourage divorces. As has been pointed out earlier, testimony adduced at trial showed that the primary purpose of N.J. Stat. Ann §2A:34-16 was to subsidize the general state court system financially for assuming the duties of heightened scrutiny once performed by the advisory masters in divorce cases. Implicit in the requirement that matrimonial cases be specially reviewed may have been the notion that the State sought to discourage collusive or consensual divorces; if so, the legislature abandoned this policy when it passed the no-fault divorce law in 1971. No longer did it cost more to process matrimonial cases; no longer could the State say that it sought not to encourage divorces. Indeed, the State had said just the opposite. Once the State determined that its citizens could have a divorce, as a matter of right, after an 18-month separation, it could not continue to make it more expensive for its citizens to assert those rights, based on a policy which it discredited and set aside. It would be a most unfair inconsistency to litigants such as Mrs. Murillo on the one hand to encourage the termination of dead marriages and on the other to raise substantial financial barriers to obtaining a divorce. See, e.g., Quinn v. Quinn, supra, 113 N.J. Super. at 414, 288 A.2d at 52.

Consideration of the recent legislative action deleting N.J. Stat. Ann. §2A:34-16 sheds further light on this question. In a statement appended to Assembly Bill No. 1073, which abolished the matrimonial fee system, the Assembly Judiciary, Law, Public Safety and Defense Committee stated:

> In the past, the $50.00 or $60.00 differential required for matrimonial cases was justified by an additional review provided in such cases by a standing master who determined whether or not the matter was fit for trial. Today, no similar review exists to justify any such differential in fees.

This statement, made by a committee of the state legislature in a non-adversarial posture, is persuasive corroboration of the testimony at trial that the fee system was not designed to discourage divorces but was merely a carryover from the days of the standing masters. The Assembly Committee concluded that "[t]he elimination of these fees would thus serve to eliminate an anachronism from the court's fee structure." These remarks were echoed by the Senate Judiciary Committee, which pointed specifically to 1971 and the divorce law revision as the juncture at which N.J. Stat. Ann. §2A:34-16 became an anachronism. Sen. Jud. Comm. Statement to Assembly, No. 1073 (June 26, 1980). These statements strongly suggest that the trial fee was probably never intended to discourage divorces; rather, it was a means of generating support for a more expensive category of litigation. However, such a finding is unnecessary to our decision. It is sufficient that we find that, after 1971, the purpose to discourage divorces has not existed, despite defendant's contentions to the contrary, and the State has no other legitimate interest in discriminating against matrimonial litigants.[13/]

IV. The Ten-dollar "Stenographer's Fee"

Finally, the additional ten dollar "stenographer's fee" required of matrimonial litigants whose cases are contested is imposed without any articulated reason.[14/] Any litigated case is more expensive for the State than cases which are uncontested, but matrimonial litigants alone were forced to pay this special stenographer's fee. In oral argument defendant contended that the State's interest

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[13/] We need not decide whether, assuming New Jersey sought to discourage divorces, the imposition of a higher filing or trial fee would be a permissible means of achieving that objective. We note, however, that any attempt to discourage lawsuits which seek to protect rights granted by the substantive law of the State inherently discriminates against litigants, like Mrs. Murillo, who are not wealthy.

[14/] It is doubtful that this fee would have been constitutional even before the promulgation of no-fault divorce.

in the marital relationship was the only justification for the fee:

> THE COURT: Can you explain a rational basis, any rational basis, for treating those two sets of litigants differently in respect to the $10 court reporter fee?
>
> MR. SIMAN: Assuming the money goes to the upkeep of the court reporter?
>
> THE COURT: It does not. It goes to the general state treasury. The court reporter gets the same salary whether he sits in matrimonial disputes or in an intersection accident dispute.
>
> MR. SIMAN: I would just rest on the fact that the state has an additional interest in the matrimonial area that it doesn't have --
>
> THE COURT: Why does it mean that the litigants have to pay money in respect to a court reporter fee? You have explained to me that took care of the filing fee. You have explained to me the filing fee is higher because all matrimonial cases are in effect litigated because the judge has to do something extraordinary. He can't take the settlement. But having already exacted that fee once, for that reason, why is it that if they actually go into litigation, that they have to pay $10 for the services of a court

> reporter who is furnished for free in every other kind of case? What is the rational basis for distinguishing between those people who litigate depending on whether they litigate in matrimonial actions versus any other kind of actions....?
>
> MR. SIMAN: I'm frankly, other than the fact that it's the state's interest, the way you phrased the question, I'm at a loss to submit something at the present time.

Transcript of 9/26/79, at 82-84.

Nothing has been presented to this Court subsequently to justify the imposition of the "stenographer's fee." This fee, clearly a vestige from the days when every divorce case required special scrutiny, serves no present state purpose.

Accordingly, the Court holds that the entire matrimonial fee system contained in N.J. Ann. §2A:34-16 and N.J. Court Rule 4:79-2, now abolished by legislative enactment, was an unconstitutionally discriminatory scheme which violated plaintiff's rights under the equal protection clause of the Fourteenth

Amendment. All monies contained in the interest-bearing bank account created pursuant to Court order and representing all of the matrimonial fees illegally collected between September 27, 1979, and August 31, 1980, will be returned with interest to the individuals who deposited them. Counsel will please submit an order in ten days.

s/ Herbert J. Stern
HERBERT J. STERN
United States District Judge

DATED: February 20, 1981

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 81-1786

MURILLO, DONNA M.

vs.

V. LEWIS BAMBRICK, Clerk of the
Superior Court of New Jersey, Appellant

(D.C. Civil No. 79-2345)
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE — DISTRICT OF NEW JERSEY

Present: Adams, Rosenn, and Sloviter, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the — District of New Jersey and was argued by counsel October 29, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered March 31, 1981, be, and the same is hereby reversed and the cause remanded for further proceedings consistent with the opinion of this Court. Costs taxed against appellee.

ATTEST:

Sally Mrvos

Clerk

June 17, 1982

DUF

Certified as a true copy and issued in lieu
of a formal mandate on July 30, 1982.
Test:
Deputy Clerk, United States Court of Appeals for the Third Circuit

Appendix D

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 81-1786

DONNA M. MURILLO,

v.

W. LEWIS BAMBRICK, etc.,
Appellant

SUR PETITION FOR REHEARING IN BANC

Present: SEITZ, Chief Judge, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER and ROSENN, Circuit Judges.

The petition for rehearing filed by Appellee

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judges Gibbons, Higginbotham and Sloviter would have granted rehearing.

By the Court,

Circuit Judge

Dated: JUL 1 2 1982

Office - Supreme Court, U.S.
FILED
OCT 22 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-529

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DONNA M. MURILLO, *et al.*,
Petitioners,

v.

W. LEWIS BAMBRICK, Clerk of the Superior Court of New Jersey,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OPPOSING PETITION FOR CERTIORARI ON BEHALF OF RESPONDENT W. LEWIS BAMBRICK, CLERK OF THE SUPERIOR COURT OF NEW JERSEY

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NO. 82-529

In the

Supreme Court of the United States

October Term, 1982

DONNA M. MURILLO, *et al.*,
Petitioners,

v.

W. LEWIS BAMBRICK, Clerk of the Superior Court of New Jersey,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OPPOSING PETITION FOR CERTIORARI ON BEHALF OF RESPONDENT W. LEWIS BAMBRICK, CLERK OF THE SUPERIOR COURT OF NEW JERSEY

Counterstatement of the Case

The petitoner would have this Court review through *certiorari* a decision of the United States Court of Appeals for the Third Circuit holding simply that the State of New Jersey was authorized to require matrimonial plaintiffs, except those entitled to a waiver because of indigency, to pay an additional filing fee intended to recoup some of the costs associated with the resulting reasonably-conceived burden upon New Jersey judicial resources. In seeking such further and extraordinary review the petitioner fails to understand that the Court of Appeals decision, *Murillo* v. *Bambrick,* 681 F. 2d 898 (3d Cir. 1932), rev'g *Murillo* v. *Bambrick,* 508 F. Supp. 830 (D.N.J. 1981), was grounded upon long-established principles articulated by this Court and by other courts not only that, in general, a legislative classification will be sustained if there be any reasonably-conceived facts to justify it, but that, in particular, the State may impose fees in order to generate revenues which need not be closely correlated to anticipated expenses but which will offer support for its court system. The Court of Appeals recognized that no basis existed for finding that the New Jersey Legislature had exceeded its law-making prerogative, especially because the subject matter of the litigation calls only for the minimum rationality standard of judicial review, and that conclusion is plainly correct. The petitioner has shown nothing to warrant consideration by this Court.

The filing fee statute, now repealed, was enacted in 1948, L. 1948, c. 323, with its first section providing:

> Except in actions in forma pauperis, before any matrimonial action is approved for trial the plaintiff or counterclaimant shall pay to the clerk of the superior court, for the use of the state, the sum of $50 and in litigated actions the additional sum of $10. [N.J.S.A. 2A:34-16]

The second section of the statute provided:

> On or before the 10th day of each month the clerk shall pay to the state treasurer all such fees which were received by him or his assistants during the preceding month and shall render a full and itemized statement or account of all such fees which may have

> been charged or which may be accrued or become payable during the month preceding the making of such statement. [N.J.S.A. 2A:34-17]

By virtue of its rule-making authority under the State constitution, N.J. Const. (1947), Art. VI, §2, ¶3, the Supreme Court of New Jersey adopted one rule which implemented the statutory requirements and another which waived them for indigents. R. 4:79-2 provided:

> Except as otherwise provided by R. 1:13-2, before any matrimonial action is approved for trial the plaintiff or counterclaimant shall deposit with the clerk the sum of $50 and in litigated actions the additional sum of $10 for stenographic fee. The aforesaid fees together with the request for approval for trial of the matrimonial action shall be forwarded to the clerk within 30 days of entry of default or the service of a pleading contesting the action.

The second rule, R. 1:13-2(a), afforded for all kinds of litigation the waiver of filing fees upon the verified application of any person alleging poverty.

The verified complaint was filed August 7, 1979 and invoked federal jurisdiction under the Fourteenth Amendment to the United States Constitution and under 42 U.S.C.A. §1983, 28 U.S.C.A. §1331(a) and 28 U.S.C.A. §1343 (3)(4). It alleged that the plaintiff Donna M. Murillo, as a resident of New Jersey for more than two years, had a cause of action for divorce under New Jersey law and had in fact commenced a divorce suit against her husband in the Superior Court of New Jersey, Chancery Division—Bergen County. Nevertheless, though her spouse had failed to answer her complaint and though she now wanted her case listed for trial as an uncontested matrimonial matter, the case would not be so scheduled unless she paid the additional statutorily-required $50 fee. Demanding a judicial declaration that the statute and court rule were invalid, the plaintiff demanded also that her complaint be certified as a class action, with the class comprised of all other matrimonial litigants similarly situated, and that the defendant W. Lewis Bambrick, Clerk of the Superior Court of New Jersey, be ordered to establish a separate interest-bearing trust account into which all matrimonal fees would be deposited during the pendency of the federal litigation. As requested by the complaint, in the event that the plaintiff ultimately prevailed the fees would be refunded to the members of the class, and the defendant would pay a reasonable counsel fee and costs of suit.

Some time after the matter was commenced the New Jersey Legislature repealed the 1948 statute, L. 1980, c. 80, and thereafter the accompanying court rule was deleted. Nevertheless, the case had already been certified as a class action, with the statutory fees having been paid by matrimonial litigants and deposited into an escrow account, and therefore the District Court proceeded to a decision on the merits, trial being held on September 9 and 10, 1980 before the Honorable Herbert J. Stern. Testimony was offered by but a single witness, Kent A. Losche, an attorney who offered background information with respect to matrimonial practice generally and with respect to his own suppositions concerning the history of the matrimonial fee legislation. After stating that advisory masters had been used in divorce cases in New Jersey during the nineteenth and early twentieth centuries and had been paid for their services, the witness said that after the constitutional revision of the New Jersey judicial system in 1948 masters had no longer been used and that after the enactment of the New Jersey Divorce Reform Law of 1971 few divorce cases were contested and most consumed little judicial time.

He opined that no reason existed to justify payment of the fee.* Upon considering the record the District Court on February 20, 1981 held the matrimonial fee statute and court rule unconstitutional as denying equal protection, the District Judge saying he could find no empirical justification underlying the fee statute (Pa61 to Pa66). *Murillo* v. *Bambrick, supra,* 508 F. Supp. at 835-837.

The Court of Appeals reversed. After holding that the litigation did not implicate any fundamental right calling for strict judicial scrutiny (Pa6 to Pa13), *Murillo* v. *Bambrick, supra,* 681 F. 2d at 902-905, the two-judge majority concluded that the New Jersey Legislature had not proceeded irrationally both in instituting the divorce fee arrangement in 1948 and in retaining that arrangement over a number of decades because "it would not have been unreasonable for the Legislature to have been of the opinion that the State's divorce system imposed financial as well as non-financial demands upon the judiciary, thereby justifying additional monetary support from the users of that system" (Pa15, Pa16). *Id.* at 906. Observing that the plaintiff and the District Court apparently concurred that the fee was valid at least until 1971 (Pa17), *id.* at 907, the Court of Appeals found that the Legislature had not acted irrationally when it continued the fee after enacting the Divorce Reform Law that year. As the Court said, "The Legislature reasonably could have believed that, even with the adoption of a more 'liberal' system of divorce, divorce-related litigation would continue to impose a financial burden upon the state's judicial machinery—a burden that could be offset, in part, through the collection of a user's fee" (Pa19). *Id.* at 908.

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* During trial four exhibits were introduced. The plaintiff introduced a statistical supplement to the Annual Report of the New Jersey Administrative Office of the Courts, a report of the Committee on Matrimonial Litigation of the Supreme Court of New Jersey recommending abolition of the matrimonial fees, a copy of the legislative bill which, when enacted, repealed the fee statute, and an order of the Supreme Court deleting the implementing court rule (T2-13 to T4-12). The State introduced an exhibit which summarized the State costs for processing matrimonial cases (T75-4 to 18, T107-4).

The plaintiff's petition for *certiorari* followed the Court of Appeals reversal. This brief opposes that petition.

ARGUMENT

The United States Court of Appeals properly held that the New Jersey statute requiring matrimonial plaintiffs to pay an additional filing fee was a legitimate means of offsetting a reasonably-conceived drain upon judicial resources caused by divorce litigation, and, especially with the statute having been repealed and no issue of nationwide significance having been presented, this Court should deny the petition for certiorari.

Despite the petitioner's best efforts to cast this case as a supposed "perfect vehicle" for a risk-filled constitutional excursion into the legislative domain over the termination of marriage (Pb14), the litigation self-evidently does not even touch upon the multitude of unique considerations which a state legislature must carefully weigh before determining how and under what circumstances the matrimonial bond may be severed. Rather, as the Court of Appeals recognized, the central legal question concerned the power of the State of New Jersey to derive financial support for its judiciary by means of a filing fee intended to ease the reasonably-conceived judicial burden of adjudicating matrimonial cases. The

Court of Appeals rightly concluded that the State was so authorized, and that holding, based as it is upon controlling precedents from this Court, has satisfactorily resolved the matter. Especially considering that the filing fee statute through its implementing court rule permitted the indigent to seek divorce without paying the fee, that the statute has now been repealed and that no question of nation-wide significance has been presented, this Court need not and should not prolong the case further.

The conclusion of the Court of Appeals that the New Jersey matrimonial fee statute was a reasonably-grounded and entirely legitimate attempt by the Legislature to deal with "a burden that could be offset, in part, through the collection of a user's fee," *Murillo* v. *Bambrick*, 681 F. 2d 898, 908 (3d Cir. 1982), is firmly based upon longstanding principles articulated by this Court concerning how an allegation of an equal protection denial is to be evaluated. In *McGowan* v. *Maryland*, 366 U.S. 420, 425-426, 81 S. Ct. 1101, 6 L.Ed. 2d 393 (1961), this Court held that "the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others" and that:

> [t]he constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

Perfection in classification "is by no means required," for a statute is not constitutionally offensive merely because

the classification "is not made with mathematical nicety. . . ." *Vance* v. *Bradley,* 440 U.S. 93, 108, 99 S. Ct. 939, 59 L. Ed. 2d 171 (1979), quoting *Phillips Chemical Co.* v. *Dumas School District,* 361 U.S. 376, 385, 80 S. Ct. 474, 4 L. Ed. 2d 384 (1960), and *Dandridge* v. *Williams,* 397 U.S. 471, 485, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970).*

In applying these principles the Court of Appeals recognized that both this Court and the New Jersey courts have repeatedly affirmed the expansive power which the State possesses over marriage. As this Court has said:

> **Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage relation**

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* The petitioner to the contrary notwithstanding (Pb22 to Pb31), this Court has by no means departed from these principles. As stated in the text:

> those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker. [*Minnesota* v. *Clover Leaf Creamery Co.,* 449 U.S. 456, 463-464, 101 S.Ct. 715, 66 L.Ed. 2d 659 (1981)].

Furthermore, the court is not to try to identify some "primary" legislative motive, for such inquiries are "a hazardous matter," and "the search for the 'actual' or 'primary' purpose of a statute is likely to be elusive." *Michael M.* v. *Superior Court of Sonoma County,* 450 U.S. 464, 469-470, 101 S.Ct. 1200, 67 L.Ed. 2d 437 (1981). Even if the original purpose of a statute might no longer be constitutionally acceptable, its validity will nonetheless be affirmed if another legitimate purpose may be hypothesized, 450 U.S. at 472, n. 7, and an asserted reason underlying a classification may not be rejected unless "it could not have been a goal of the legislation." *Id.* at 470, quoting *Weinberger* v. *Wiesenfeld,* 420 U.S. 636, 648, n. 16, 95 S.Ct. 1225, 43 L.Ed. 2d 514 (1975).

> creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of commanding problems in the field of domestic relations with which the state must deal. [*Williams* v. *North Carolina*, 317 U.S. 287, 298, 63 S.Ct. 207, 87 L.Ed. 279 (1942)]

Divorce is of concern not merely to the immediate parties, for "[i]t affects personal rights of the deepest significance. It also touches basic interests of society." *Williams* v. *North Carolina*, 325 U.S. 226, 230, 65 S.Ct. 1092, 89 L.Ed. 1577 (1945). *Sosna* v. *Iowa*, 419 U.S. 393, 407-409, 95 S.Ct. 553, 42 L.Ed. 2d 532 (1975).

In New Jersey, both before and after enactment of the Divorce Reform Law of 1971, the State has always been "in fact if not in name a third party having a substantial interest," and therefore special responsibilities are imposed upon the court and upon attorneys as officers of the court. *In re Backes*, 16 N.J. 430, 433-434 (1954); *Grunauer* v. *Grunauer*, 80 N.J. Super. 531, 535-536 (App. Div. 1963). Since "[t]he public is represented by the conscience of the court," *In re Backes*, 16 N.J. at 434, "the utmost care should be taken in order to determine the *bona fides* of the action." *Welch* v. *Welch*, 35 N.J. Super. 255, 255 (App. Div. 1955). None of these propositions has been changed by the 1971 divorce law amendment. Marriage remains "a social relationship subject in all respects to the state's police power," *Rothman* v. *Rothman*, 65 N.J. 219, 228 (1974), and a court may terminate a marriage only upon ascertaining that the statutory criteria have been satisfied. *Babushik* v. *Babushik*, 157 N.J. Super. 128, 130 (Ch. Div. 1978); *Ellam* v. *Ellam*, 132 N.J. Super. 358, 362-363 (Ch. Div. 1975). For this reason even today, a decade after the divorce law was amended, a divorce case in New Jersey, unlike other kinds of civil cases, may not be decided solely upon affidavits. *Manion* v. *Manion*, 143 N.J. Super. 499, 502-503 (Ch. Div. 1976).

It is not surprising, then, that over the years the New Jersey Legislature should have enacted provisions designed to deal not only with the substance of marital dissolution, but also with the impact which such matters would have upon the judicial system and the consequent need to establish a ready source of revenue. The desire of the State to generate revenues to support its court system is a rational basis for a filing fee requirement, *Ortwein* v. *Schwab*, 410 U.S. 656, 660, 93 S.Ct. 1172, 35 L.Ed. 2d 572 (1973); *Bernstein* v. *New York*, 466 F. Supp. 435, 438-439 (S.D.N.Y. 1979), for one of the legitimate purposes of a filing fee is "to make the [judicial] system self-sustaining and paid for by those who use it rather than by tax revenue drawn from the public at large." *United States* v. *Kras*, 434 U.S. 434, 448, 93 S.Ct. 631, 34 L.Ed. 2d 626 (1973). The fact that the fees are deposited into the general fund of the Treasury instead of being earmarked for the support of the courts specifically does not derogate from this rational basis, moreover, since the financial support for the courts comes from that same general fund. *Manes* v. *Goldin*, 400 F. Supp. 23, 30-31 (E.D.N.Y. 1975).

Upon general principles "[t]he State is not compelled to verify logical assumptions with statistical evidence," *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 812, 96 S.Ct. 2488, 49 L.Ed. 2d 220 (1976), and the State certainly need not demonstrate a careful correlation between income and expenses in order to justify a judicial filing fee. As one court has said:

> In matters affecting budgetary policy and the extent to which the cost of providing particular governmental services should be borne by the users of those

> services, the Legislature is in a far better position than a reviewing court to weigh the variable factors which may have a bearing on the fiscal problem. [*Joslin* v. *Regan*, 406 N.Y.S. 2d 938, 942 (App. Div. 1978)]

No doubt can exist, then, that at the time of enacting the matrimonial fee schedule in 1948 the New Jersey Legislature possessed the broadest of discretion to deal effectively with the perceived special characteristics of divorce litigation, and it could well have conceived that matrimonial cases by their nature would produce a drain upon judicial resources justifying additional fees to be paid by matrimonial plaintiffs. Furthermore, as the Court of Appeals held, "The Legislature reasonably could have believed that, even with the adoption of a more 'liberal' system of divorce [in 1971], divorce-related litigation would continue to impose a financial burden upon the State's judicial machinery —a burden that could be offset, in part, through the collection of a user's fee." *Murillo* v. *Bambrick*, 681 F. 2d at 908.*

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* Plainly the Legislature might reasonably have contemplated this burden upon the judiciary simply from the fact that under the 1971 revision grounds for divorce were broadened, meaning that a larger number of divorce actions would likely be filed. It is worth noting, furthermore, that the 1971 divorce law "liberalization" prompted more than one commentator to envision significant interpretive difficulties. For example, with respect to the revised extreme cruelty ground, a New Jersey Law Journal commentator inquired whether an objective test or a subjective test was to be applied. Skoloff, "The Divorce Reform Law—A Brief Review," 94 N.J.L.J. 701, 701 (1971). With respect to the new 18-month separation ground, a Rutgers Law Review writer noted that the law did not indicate what evidence would be required to overcome the presumption against a reasonable prospect of re-

(Footnote continued on following page)

The petitioner would avoid this obviously lawful justification for the filing fee by urging at this late date —she did not so argue in either the District Court or the Court of Appeals, with the hypothesis having been raised only by the Court of Appeals dissenting judge—that the fundamental right/compelling state interest analysis be imposed upon the divorce statutes of all jurisdictions. Yet an array of legal principles as well as practical considerations dictates that divorce not be so considered. Perhaps paramount are the facts not only that the fee statute has been repealed, L. 1980, c. 80, but that by virtue of implementing court rules waiving the fee for the indigent, R. 4:79-2; R. 1:13-2, the statute did not restrict access to the judicial forum. *Cf. Boddie* v. *Con-*

(Footnote continued from preceding page)

conciliation once the 18 months have expired. "The 1971 New Jersey Divorce Law," 25 *Rutg. L. Rev.* 476, 480 (1971). The new statutory provisions dealing with post-divorce matters were of special concern, with one commentator finding that the alimony section "raises more controversy and more questions than any other provision of the Divorce Reform Law and it will require a considerable amount of case law before the provisions will be clear." 94 N.J.L.J. at 708.

The New Jersey courts eventually had to resolve many of these issues. Regarding the 18-month separation ground, the Chancery Division in *Morrison* v. *Morrison*, 122 N.J.Super. 277, 283 (Ch. Div. 1972), and *Brittner* v. *Brittner*, 124 N.J.Super. 259, 262 (Ch. Div. 1973), detailed how the judiciary was to balance the presumption against reconciliation generated by 18 months of separation against the public policy of not dissolving a marriage still having some vitality. As predicted by the New Jersey Law Journal commentator, moreover, in the third year after enactment of the Divorce Reform Law the Supreme Court of New Jersey was obligated to set forth guidelines concerning equitable distribution of assets. *Painter* v. *Painter*, 65 N.J. 196, 208-211 (1974). The predicted interpretive difficulties were thus no mere mirage.

necticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed. 2d 113 (1971). From the broader perspective, moreover, in the past this Court has wisely refrained from using the fundamental right concept so as to become too deeply involved in matters which are clearly within the legislative province, *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 33-44, 93 S.Ct. 1278, 36 L.Ed. 2d 16 (1973), and it should refrain from becoming involved here as well. "We are not authorized nor are we qualified to formulate a national code of domestic relations." *Williams* v. *North Carolina, supra,* 317 U.S. at 304 (Frankfurter, J., concurring).

Beyond question the authority over divorce resides in the states rather than in the federal government "as it is certain that the Constitution of the United States confers no power whatever upon the government of the United States to regulate marriage in the states, or its dissolution. . . ." *Andrews* v. *Andrews,* 188 U.S. 14, 32, 23 S.Ct. 237, 47 L.Ed. 366 (1903). *Barber* v. *Barber,* 62 U.S. 582, 584, 16 L.Ed. 226 (1859). Instead, with divorce in England having originally been granted solely by the ecclesiastical courts and by a few special acts of Parliament and with there having been no common law in that regard, the American states assumed the power to terminate marriage by statutory authorization only. *E.g. Heath* v. *Heath,* 85 N.H. 419, 159 A. 418, 424 (Sup. Ct. 1932); *Worthington* v. *District Court,* 37 Nev. 212, 142 P. 230, 237 (Sup. Ct. 1914). *See also Maynard* v. *Hill,* 125 U.S. 190, 206-207, 8 S.Ct. 723, 31 L.Ed. 654 (1888). Consequently, "[a] divorce cannot be had except in that court which the state authorizes, and for those causes only, and with those formalities, which it has by statute prescribed." *Dennis* v. *Dennis,* 68 Conn. 186, 36 A. 34, 37 (Sup.Ct.Err. 1896).

In view of this historical background the states have uniformly exercised their power in plenary fashion. New Jersey, for example, has seen fit to control the commencement of the marriage relationship by imposing limitations upon consanguinity, N.J.S.A. 37:1-1, the age of consent, N.J.S.A. 37:1-6, and disease, among other considerations. N.J.S.A. 37:1-9, 23, 27. The New Jersey Legislature has determined as well that marriage may be terminated only upon certain specified grounds, which include among others not only adultery, N.J.S.A. 2A:34-2(a), but desertion which must be wilfull and continued for 12 or more months, N.J.S.A. 2A:34-2(b), separation for 18 or more consecutive months with no reasonable prospect of reconciliation, N.J.S.A. 2A:34-2(d), voluntarily induced narcotic addiction or habitual drunkenness for 12 or more consecutive months after marriage, N.J.S.A. 2A:34-2(e), institutionalization for mental illness for 24 or more consecutive months after marriage, N.J.S.A. 2A:34-2(f), and imprisonment for 18 or more consecutive months after marriage. N.J.S.A. 2A:34-2(g). As this Court explained long ago, marriage "is more than a contract," for "[i]t partakes more of the character of an institution regulated and controlled by public authority, upon principles of public policy, for the benefit of the community." *Maynard* v. *Hill, supra,* 125 U.S. at 213. The states, New Jersey in particular, have dealt with marriage upon this understanding.

With the legislature of each state possessing this breadth of discretion to determine the conditions under which divorce may be allowed, this Court must proceed, at the very least, with the utmost caution before characterizing divorce as a "fundamental right." The situation is comparable to that in *San Antonio School District* v. *Rodriguez, supra,* in which this Court was urged to characterize the right to a public school education as fundamental, thereby engendering the most closely focused of judicial scrutiny of every state legislative measure dealing with that subject. In refusing to accept that invitation this Court noted that:

> we are urged to direct the States either to alter drastically the present system or to throw out the property tax altogether in favor of some other form of taxation. No scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact. In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause. [411 U.S. at 41]

Acknowledged was the fact that "the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues." *Ibid.*

The identical considerations pertain here. A characterization by this Court of divorce being a "fundamental right" would constitute a directive to courts across the nation, state as well as federal, to question inquisitively whether each of the many state legislative provisions limiting divorce substantively and procedurally is undergirded by some "compelling state interest" and then to invalidate the provision if the legislative view does not coincide with that of the reviewing court. The states have always assumed that they need not favor divorce and may permit it only "when those conditions are found to exist, in respect to one or the other of the married parties, which seem to the legislature to make it probable that the interests of society will be better served, and that parties will be happier, and so the better citizens, separate, than if compelled to remain together." *Dennis* v. *Dennis, supra,* 36 A. at 37. Yet, from the New Jersey standpoint alone what proof could be adduced, other than the perceptions and general understanding of the legislators, that divorce is "compellingly" warranted only when desertion exceeds 12 months rather than some shorter period, N.J.S.A. 2A:34-2(b), or when separation exceeds 18 months—again in contrast to some other time period—and is combined with no reasonable prospect of reconciliation? N.J.S.A. 2A:34-2(d). How might a reviewing court deal with the distinction between voluntarily induced narcotic addiction or habitual drunkenness, which need occur for only 12 consecutive months after marriage in order to justify divorce, N.J.S.A. 2A:34-2(e), and imprisonment, which must have occurred for 18 months after marriage, N.J.S.A. 2A:34-2(g), or mental illness institutionalization, which must have occurred for 24 months? N.J.S.A. 2A:34-2(f). The distinctions are by no means irrational; they are simply the kinds of policy judgments which are to be made by the Legislature, not by the courts.

In short, the courts are simply not equipped to adjudicate the public policy imponderables which comprise the legislative judgment concerning divorce. Even were this Court desirous of plunging into this legislative policy tangle, it would most assuredly wish to do so only within the context of litigation whose background elucidates the nature of the issues and the extent to which a court might safely become involved. Under these criteria the present case is manifestly not at all suitable, for it does not even concern divorce as such, but concerns, instead, nothing more than a judicial filing fee. Not so incidentally, moreover, the statute which imposed that fee has been repealed, meaning that even that issue has lost whatever significance it might have had for the future. These pragmatic considerations must not obscure the fundamental point, however. As the Court of Appeals held, the only legal question was whether the State of New Jeresy might call for a filing fee in matrimonal cases to help alleviate a reasonably-perceived drain upon the judicial system, and that question was properly answered in the affirmative. With there being no legal issue of import for New Jersey or for the nation, this Court should deny the petition for *certiorari*.

CONCLUSION

It is respectfully submitted that for these reasons the petition for *certiorari* should be denied.

Date:

Respectfully submitted,

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